UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-16486

CAROL STAVROPOULOS,
PLAINTIFF-APPELLANT,
v.
EVAN FIRESTONE, W. ROBERT NIX, ET AL.,
DEFENDANTS-APPELLEES.

Argued and Submitted:
Opinion Filed: February 25, 2004

Appeal from the United States District Court for the Middle District of Georgia; Duross Fitzpatrick, District Judge, Presiding. D.C. Docket No. 97-00095 CV-DF-3.

Before EDMONDSON, Chief Judge, DUBINA and COX, Circuit Judges.

OPINION

COX, Circuit Judge.

I. INTRODUCTION

Plaintiff, Carol Stavropoulos, appeals the district court's entry of summary judgment for the Defendant Board of Regents of the University System of Georgia ("Board") on her claim that the Board violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). She also appeals the summary judgment for Defendants Evan Firestone and William Squires on her 42 U.S.C. § 1983 First Amendment retaliation claim. We affirm.

II. BACKGROUND & PROCEDURAL HISTORY

In 1993 the University of Georgia hired Stavropoulos as an assistant professor in the School of Art for the Art Education Program. In 1993 and 1994 she received excellent job performance ratings.

As an untenured assistant professor, Stavropoulos was employed pursuant to a one-year contract. The senior faculty of the School of Art votes each year on whether to renew the contracts of its untenured assistant professors. This vote, however, is not necessarily binding. The dean and assistant dean of the School of Art have the power to override the faculty vote. And, an assistant professor has the right to appeal a vote of non-renewal by filing a grievance with the University's faculty senate, which also can override the non-renewal vote.

During the fall semester of 1994, Defendant Firestone, Director of the School of Art, selected Stavropoulos and five other professors to screen applicants and to recommend a candidate to fill a computer artist position. After reviewing the applications for the job, Plaintiff and another committee member, Dr. Bradley Tindall, believed that a female candidate, Dr. Ann Marie LeBlanc, was the best qualified. The majority of the committee, however, favored hiring Dr. David Kaufman, who was already employed in the School of Art. Because Stavropoulos believed that the majority had begun the process intending to hire Dr. Kaufman, she felt that they were treating Dr. LeBlanc's application unfairly. She voiced her concerns about this perceived unfairness, and, on one occasion, did so by yelling and shaking her fist at her fellow committee members. The committee ultimately voted, four-two, to recommend Dr. Kaufman for the job, with Stavropoulos and Dr. Tindall casting the dissenting votes.

In March 1995 the committee presented its recommendation to the faculty of the School of Art. Dr. Tindall presented his and Stavropoulos's view that Dr. LeBlanc was the most qualified candidate. The faculty voted

to hire Dr. Kaufman. Afterwards, Dr. Tindall and Stavropoulos told Director Firestone that they were going to file a minority report with the Dean of the School of Art. The report, which they filed immediately, detailed Dr. LeBlanc's qualifications, and asserted that as most of the faculty members in the computer field were men, hiring Dr. LeBlanc, a woman, would promote diversity and encourage minorities.

In response to the report, Director Firestone sent a memorandum to Stavropoulos and Dr. Tindall. In the memo, Director Firestone expressed his disapproval of the report, as the committee acted only as an advisory body. Firestone sent copies of the memo to the dean and the assistant dean of the art school.

Shortly after the faculty vote and the minority report, Dr. LeBlanc sent a letter to the University's Legal Affairs Department, stating that she may have been the victim of gender discrimination in the selection of the computer artist. Stavropoulos assisted Dr. LeBlanc by asking a faculty member in the University's Womens' Studies Department to help with Dr. LeBlanc's complaint. Director Firestone learned that Stavropoulos had provided this assistance.

Stavropoulos again received excellent performance evaluations in 1995. In June 1995, however, the faculty voted not to renew Stavropoulos's contract. Several of the faculty members who voted for non-renewal stated that they voted this way because Stavropoulos was not collegial but was insulting and hostile to her fellow faculty members. When Stavropoulos learned of the vote, she complained to the dean of the School of Art about the vote. In response to Stavropoulos's complaints, the associate dean met with Director Firestone. The associate dean asked Director Firestone for documentation of Stavropoulos's uncollegial behavior. To provide this documentation, Director Firestone solicited and compiled letters written by faculty members discussing Stavropoulos's behavior and job performance. Firestone provided this file of letters to the dean and associate

dean. After reviewing the file and the records of the faculty's non-renewal proceedings, the deans decided to reject the faculty vote as unsupported by Stavropoulos's performance ratings. Thus, Stavropoulos was given an employment contract for the 1995-96 academic year. At no time during this process had the University terminated Stavropoulos or otherwise informed her that her contract had not been renewed.

In March 1996 Stavropoulos for the first time received a negative performance evaluation. Around this time, Stavropoulos was due for a third-year review, an evaluation conducted at the end of every tenure-track teacher's third year which examines how that teacher is progressing towards being awarded tenure.[1] Director Firestone chose the four review committee members; he chose three of the four members of the review committee from outside the Art Education Program to avoid any appearance of bias against Stavropoulos. Defendant Squires was chosen as the chairman of the committee.

When the third-year review committee convened in April 1996, Director Firestone charged them with their duties; he opened the charge with "welcome to the committee from hell." (R.3-132 at Ex. F at 199.) He also charged them to review everything regarding Stavropoulos's teaching, research, and service. Though this initially included the file of letters compiled by Firestone, the dean's office clarified that

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[1] Around this time, Stavropoulos sought a promotion and early tenure. On the faculty's recommendation, the University denied these requests. In her complaint, and in defending against the Defendants' motions for summary judgment, Stavropoulos alleged that these denials constituted illegal retaliation. The district court concluded that while these denials were adverse employment actions, the Defendants had proffered legitimate, nondiscriminatory reasons for the denials, which Stavropoulos had failed to show to be pretextual. Stavropoulos does not challenge this conclusion on appeal.

the committee could not consider those letters. The dean's office also made clear that Stavropoulos would be given the opportunity to respond to her review.

Chairman Squires gave the faculty the opportunity to be interviewed by the committee, and gave Stavropoulos the opportunity to give the committee information on her job performance. Stavropoulos alleges that Firestone encouraged faculty members to relate to the committee their negative experiences with Stavropoulos. Firestone submitted to the committee a memo recounting his version of the facts of Stavropoulos's involvement with Dr. LeBlanc's discrimination claim.

Chairman Squires prepared a memorandum entitled "Understanding the Role Played by Illness Relative to Carol Stavropoulos's Performance of Her Duties as a Faculty Member," (R.3-132 at Ex. W) in which Squires opined that Stavropoulos suffered from a mental illness which affected her ability to work with other faculty members. When the committee interviewed Stavropoulos, some members of the committee asked her about her mental health and about certain mental-health prescription drugs she may have taken. Stavropoulos told the committee that she did not suffer from a mental illness; when she made this assertion, Chairman Squires became visibly angry. The third-year review committee's report, published to the faculty on May 27, 1996, stated: "Although it has been mentioned to the committee as an exacerbating factor in her working relationships with others, Dr. Stavropoulos denies that illness has ever in any way compromised her performance as a faculty member." (R.3-132 at Ex. X at 6.)

In June 1996 the faculty met to consider whether to renew Stavropoulos's employment contract for another year. The third-year review committee presented its report. The report discussed Stavropoulos's public anger and hostility toward other faculty members; Stavropoulos's giving "A's" to all of her students in one full calendar year, which called

into question the reliability of her positive student course evaluations; Stavropoulos's resistance to learning and following procedures, both of which resulted in inaccurate guidance and advice to students; and Stavropoulos's holding classes in her home rather than on campus. The report concluded: "The committee agreed that Dr. Stavropoulos is making good progress toward achieving promotion and tenure in the area of research. However, persistent and ongoing problems in the areas of teaching and service are jeopardizing Dr. Stavropoulos' progress towards promotion and tenure." (Id.) Chairman Squires then read a response to the third-year review report, prepared by Stavropoulos.

Later in the meeting, Squires explained to the faculty that he and Director Firestone had talked to the deans about the vote, and that the deans had said that they would not interfere with the faculty's decision this time. Squires explained that he thought that much of Stavropoulos's conduct could be attributed to a mental illness that he said she had told him privately that she suffered from. He then read a portion of his mental illness memo. At the close of the meeting, the faculty voted not to renew Stavropoulos's contract.

After Director Firestone informed Stavropoulos that the faculty had voted not to renew her contract, Stavropoulos filed a grievance with the faculty senate. The faculty senate's grievance panel held a hearing beginning on June 9, 1997. Stavropoulos was represented by an attorney in the grievance proceeding, and bore the cost of this representation. After hearing the grievance, the panel issued a report on June 23, 1997. The report concluded that the art school faculty had improperly voted not to renew Stavropoulos because of her sex, because they perceived her as having a disability, and in retaliation for her conduct in connection with the 1995 selection of the computer artist. As a result, Stavropoulos retained her job with no loss of pay or benefits. She was not, however, reimbursed for the cost of her attorney.

Plaintiff filed this action for damages and injunctive relief, alleging violations of the First Amendment, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, and the Americans with Disabilities Act, against all Defendants.[2] Defendants Firestone and Squires moved to dismiss all claims against them, and the district court granted in part and denied in part this motion.[3] The court allowed Stavropoulos to proceed with her § 1983 First Amendment claim of retaliation brought against these Defendants in their individual capacities,[4] reasoning that, under the facts as alleged in the complaint, these Defendants were not entitled to qualified immunity. These Defendants appealed the qualified immunity ruling, and we affirmed in part, reversed in part, and remanded, concluding that Stavropoulos could proceed on her First Amendment retaliation claim to the extent that she alleged that these Defendants, in their individual capacities, retaliated against her for assisting Dr. LeBlanc in pursuing a claim of gender discrimination. *Stavropoulos v. Firestone*, 178 F.3d 1303, unpublished at 2-3 (11th Cir. 1999). After discovery, all Defendants moved for summary judgment. The district court granted the motions, and entered summary judgment for the Defendants. Stavropoulos appeals.

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[2] Stavropoulos's complaint also alleged several state law claims against Defendant W. Robert Nix. The district court dismissed these claims on Nix's motion, and Stavropoulos does not question this dismissal on appeal.

[3] Nix also joined this motion.

[4] The court also allowed Stavropoulos's official-capacity Title VII, Title IX, and ADA claims against Firestone, Squires, and Nix to proceed, though it recognized them as redundant to claims against the Board. In its summary judgment order, the district court dismissed these official-capacity statutory actions as redundant. Stavropoulos does not question this dismissal.

III. CONTENTIONS OF THE PARTIES

Stavropoulos makes two contentions on appeal. First, she argues that the district court erred in entering summary judgment for the Board on her Title VII retaliation claim. Specifically, she argues that the court erred when it concluded that neither the 1995 non-renewal vote, the 1996 negative performance review, the negative third-year review, nor the 1996 non-renewal vote constituted adverse employment actions for purposes of Title VII.

Second, Stavropoulos contends that the district court erred in granting Firestone and Squires summary judgment on her § 1983 First Amendment retaliation claim. The court held that they were shielded from suit, in their individual capacities, on the basis of qualified immunity.[5] Stavropoulos argues that the court incorrectly held that she had failed to establish a First Amendment violation against these Defendants on the grounds that they had not subjected Stavropoulos to an adverse employment action for purposes of First Amendment retaliation.[6]

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[5] Parts of Stavropoulos's appellate briefs seem to press her § 1983 First Amendment retaliation claim against the Board. However, the district court dismissed Stavropoulos's § 1983 claims against the Board, reasoning that because the Board is an arm of the state, it is not subject to being sued under § 1983. Stavropoulos does not contend that this dismissal was in error. Thus, we examine Stavropoulos's arguments concerning her § 1983 claim as against the individual Defendants only.

[6] On appeal, Stavropoulos advances her First Amendment claims against Firestone and Squires on a retaliatory-harassment theory, i.e., that the combination of their trivial acts reached such a critical mass that they created a working environment unreasonably inferior to a normal working environment. But Stavropuolos did not present this theory to the district court when summary judgment motions were pending. Instead, she presented it for the first time in a motion to reconsider the summary judgment, (R.4-158, 159), which the district court denied as untimely (R.4-166). Stavropoulos does not argue that the court abused its

The Defendants maintain that the district court committed no error.

IV. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment, applying the same familiar standards as the district court. *Hallum v. Provident Life & Acc. Ins. Co.*, 326 F.3d 1374, 1375-76 n.1 (11th Cir. 2003).

V. DISCUSSION

Both of Stavropoulos's issues on appeal involve the substantiality of actions taken against her: whether these actions were substantial enough to be considered adverse employment actions under Title VII and the First Amendment.

A. Stavropoulos's Title VII Retaliation Claim against the Board

The district court granted summary judgment on Stavropoulos's Title VII retaliation claim, because it concluded that Stavropoulos failed to make out a prima facie case. To establish a prima facie case of retaliation, a plaintiff must show that (1) she engaged in protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between the protected activity and the adverse employment action. *Bass v. Bd. of County Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1117 (11th Cir. 2001). The court held that Stavropoulos failed to show an adverse employment action.

To be considered an adverse employment action for purposes of Title VII's anti-retaliation provision, the action must either be an ultimate employment decision or else must

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discretion in denying her motion to reconsider. Because Stavropoulos failed to properly present her retaliatory-harassment theory to the district court, we decline to consider it on appeal. *Twiss v. Kury*, 25 F.3d 1551, 1556 (11th Cir. 1994) ("We generally will not consider a legal theory that was not presented to the district court . . .").

"meet some threshold level of substantiality." *Id.* at 1118 (internal quotations omitted). Ultimate employment decisions include decisions such as termination, failure to hire, or demotion. *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998). The conduct Stavropoulos complains of was not an ultimate employment action, because she did not lose her job or suffer a lessening of pay, position, or benefits. Thus, we must ask whether it rises to the level of substantiality.

In *Wideman*, 141 F.3d at 1455-56, we concluded that the plaintiff had crossed the threshold of substantiality where she established that her employer had improperly listed her as a no-show on a day she was scheduled to have off, gave her written reprimands which resulted in a one-day suspension, solicited comments on her performance from only those employees with negative things to say about her, failed to schedule her for work, threatened to shoot her in the head, and delayed authorizing medical treatment for an allergic reaction she was having. *Id.* at 1455-56 (holding that the totality of these acts meet the threshold of substantiality, but declining to decide whether anything less than the totality would meet the threshold). In *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571 (11th Cir. 2000), we characterized the threshold as requiring the employment action to be "'objectively serious and tangible enough' to alter [the employee's] 'compensation, terms, conditions, or privileges of employment . . . ,'" and held that scheduling the employee to teach on three different campuses in one term did not meet the threshold because she never actually had to follow this schedule, denying her the opportunity to teach a particular class did not suffice because she chose not to teach at all that term, and delaying the return of the employee's visa application was not serious enough because the university returned it to her in time for her to file it with the Immigration and Naturalization Service. *Id.* at 588 (quoting *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3rd Cir. 1997)). Our reason for rejecting these three acts as insubstantial was that "an action which, it turns out, had no

effect on an employee is not an 'adverse' action." *Id.* at 588. Applying this standard in *Bass*, 256 F.3d at 1118, we decided there was an adverse employment action when, comparing the plaintiff to other employees of the same rank, the employer forced plaintiff to perform more menial tasks under less senior personnel; denied the plaintiff opportunities to earn several types of extra pay available to his co-workers; and forced plaintiff to take tests in order to maintain his paramedic pay, while not requiring his co-workers to take the tests. We rejected, however, the employer's ordering plaintiff not to record certain tasks in his work log and ordering him to destroy certain materials he had created as insubstantial because they "in no way punished or affected Bass' employment status." *Id.*

Here, the acts Stavropoulos complains of ultimately had no effect on her employment status. Though agents of the Board rated her negatively and voted to terminate her, other agents of the Board overrode the votes, keeping Stavropoulos in her position, with the same pay and benefits. Thus, these acts were not objectively serious and tangible enough to be adverse employment actions. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001) (noting that Title VII retaliation caselaw "indicates that the decision to reprimand or transfer an employee, if rescinded before the employee suffers a tangible harm, is not an adverse employment action"). *Cf. Dobbs-Weinstein v. Vanderbilt Univ.*, 185 F.3d 542, 543-46 (6th Cir. 1999) (affirming summary judgment for university in associate professor's Title VII discrimination case because, on the professor's appeal, the faculty senate reversed the dean's decision to deny her tenure, and awarded tenure retroactively so that she lost no salary; thus there was no adverse employment action). Any emotional distress or costs incidental to Stavropoulos's seeking the review provided in her contract with the Board is likewise too insubstantial to be considered an adverse employment action since the review proved successful for Stavropoulos. *Bass*, 256 F.3d at 1118 ("While not everything

that makes an employee unhappy is an actionable adverse action, conduct that alters an employee's compensation, terms, conditions, or privileges of employment does constitute an adverse action under [the anti-retaliation provisions of] Title VII.") (internal citations and quotations omitted).

Because Stavropoulos failed to show that the Board subjected her to an adverse employment action, she failed to make out a prima facie case of retaliation under Title VII.

B. Stavropoulos's § 1983 First Amendment Retaliation Claim against Firestone and Squires

Stavropoulos next argues that the district court erred in holding that Firestone and Squires, in their individual capacities, were protected by qualified immunity from her First Amendment retaliation claims against them.

To determine whether a state officer, acting within his discretion, is entitled to qualified immunity, we employ a two-step, sequential analysis. First, we ask whether the officer's conduct violated a constitutional right, taking the facts in the light most favorable to the party asserting the injury. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). If we find that the officer's conduct violated a constitutional right, we must ask whether the right was clearly established. *Id.* If we find that the conduct did not violate a constitutional right, or that the right was not clearly established, then the officer is shielded from suit by qualified immunity. *Id.*

To state a claim for retaliation in violation of the First Amendment, a public employee must show that her employer retaliated against her because of her speech on a matter of public concern. *McCabe v. Sharrett*, 12 F.3d 1558, 1564 n.3 (11th Cir. 1994). A public employer retaliates when he takes an adverse employment action that is likely to chill the exercise of constitutionally protected speech. *Goffer v. Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992). Here, the district court concluded Stavropoulos failed to establish a

violation, as she failed to show that Firestone and Squires subjected her to an adverse employment action. Based on the failure to state a constitutional violation, the court held that Firestone and Squires were shielded by qualified immunity.

The district court based its conclusion that Firestone and Squires had not subjected Stavropoulos to an adverse employment action solely on its Title VII adverse-action analysis: because there was no adverse employment action for Title VII purposes, the court held without further analysis that there was no adverse action for First Amendment purposes. Stavropoulos contends that this was error, because, she argues, the First Amendment imposes a much more liberal standard in determining whether an employment action is adverse. She argues that any action likely to chill the employee's exercise of constitutionally protected speech satisfies the adverse employment action requirement. This standard is contrary to our precedents. While it is true that a claimant must show a chilling effect on her protected speech, she must also show that this effect resulted from an adverse employment action.

To be considered an adverse employment action in a First Amendment retaliation case, the complained-of action must involve an important condition of employment. *Bickel v. Burkhart*, 632 F.2d 1251, 1255 n.6 (5th Cir. Unit A 1980)[7] (concluding that a fire chief's decision not to promote a firefighter in retaliation for the firefighter's negative public comments about the fire department was an adverse employment action, stating: "Where, as here, important conditions of employment are involved, a public employee will not be foreclosed from § 1983 relief merely because the impermissible retaliation did not result in the termination of his employment."). We have defined which acts involve

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[7] Decisions of the Fifth Circuit rendered on or before September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

important conditions of employment by a list of examples. This list includes include discharges, demotions, refusals to hire or promote, and reprimands. *See Goffer*, 956 F.2d at 1049 n.1 (listing examples of adverse employment actions: "refusal to hire, demotion, reprimand, refusal to promote"). *See also McCabe*, 12 F.3d at 1563 ("'Adverse employment action' is broadly defined and as a matter of law includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands"; citing *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79, 110 S. Ct. 2729, 2739, 111 L. Ed. 2d 52 (1990),[8] where the Court held that a public employer could not award or deny promotions, transfers, recalls, and hires on the basis of political party affiliation without running afoul of the First Amendment).

While we have not explicitly equated this element with Title VII's adverse employment action requirement, we regularly draw cases applying this rule to inform our analysis of Title VII retaliation claims. *See, e.g., Davis v. Town of Lake Park, Fla.*, 245 F.3d 1232, 1238 (11th Cir. 2001) (quoting the adverse employment action passage in *McCabe*, a First Amendment retaliation case, in analyzing whether an

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[8] In *Rutan*, the Supreme Court noted with approval a Seventh Circuit case which held that "even an act of retaliation as trivial as failing to hold a birthday party for a public employee [could be actionable] when intended to punish her for exercising her free speech rights." *Rutan*, 497 U.S. at 75 n.8, 110 S. Ct. at 2737-38 n.8 (citation omitted). Because this was not the Court's holding, and was not necessary to the Court's holding, it is dicta. And since it is dicta, we decline to break with our precedents to follow it. *See Pierce v. Tex. Dep't of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1149-50 n.1 (5th Cir. 1994) (noting that this language is dicta, that the holding of *Rutan* is consistent with *Bickel*'s requirement that to be an adverse employment action, the action must affect an important condition of employment, and therefore refusing to follow the *Rutan* dicta; but noting that in *Tao v. Freeh*, 307 U.S. App. D.C. 185, 27 F.3d 635, 639 (D.C. Cir. 1994), the D.C. Circuit applied the dicta as the rule in First Amendment retaliation cases).

employment action was adverse for Title VII purposes); *Wu v. Thomas*, 996 F.2d 271, 273 (11th Cir. 1993) (citing *Bickel* in its analysis of whether the plaintiffs had been subjected to an adverse employment action under Title VII). This is because the standards are consonant. Compare *Bass*, 256 F.3d at 1118 (requiring an action to be "an ultimate employment decision" or to "meet some threshold level of substantiality", and stating that "conduct that alters an employee's compensation, terms, conditions, or privileges of employment does constitute an adverse action under Title VII") with *Bickel*, 632 F.2d at 1255 n.6 (requiring "important conditions of employment" to be involved to be an adverse employment action under the First Amendment).

Requiring the First Amendment retaliation claimant to show that the action she complains of not only was likely to chill her speech but also altered an important condition of employment insures that she satisfies the injury-in-fact requirement of federal justiciability law. To satisfy this justiciability requirement, the claimant "'must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action.'" *Laird v. Tatum*, 408 U.S. 1, 13, 92 S. Ct. 2318, 2325, 33 L. Ed. 2d 154 (1972) (quoting *Ex Parte Levitt*, 302 U.S. 633, 634, 58 S. Ct. 1, 82 L. Ed. 493, (1937)). The Supreme Court has held that, in the First Amendment context, "allegations of a subjective 'chill' are not an adequate substitute for a claim of a specific present objective harm or a threat of specific future harm." *Laird*, 408 U.S. at 13-14, 92 S. Ct. at 2325-26. Thus, to satisfy principles of justiciability, an employee complaining of First Amendment retaliation must show more than her subjective belief that the employer's action was likely to chill her speech: she must show that the action had an impact on an important aspect of her employment. This too is consonant with Title VII. *See, e.g.*, *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995) (affirming judgment as a matter of law for county on employee's Title VII and 42 U.S.C. § 1981 claims, stating: "Where an employer has taken prompt and

effective corrective measures to redress alleged incidents of racial harassment, the employer is not liable because its final act was not of a discriminatory nature. It is the complainant's consequent lack of injury-in-fact . . . that bars judicial redress.").

Thus, we conclude that the district court committed no error by applying Title VII standards of what is an adverse employment action to Stavropoulos's First Amendment retaliation claim. Applying this standard to Stavropoulos's claims against Firestone, and Squires, we conclude that the district court committed no error inconcluding that neither of these Defendants inflicted an adverse employment action upon Stavropoulos.[9]

Stavropoulos asserts that Firestone's adverse employment actions were his sending her a memo criticizing her for filing a report with the dean's office on Dr. LeBlanc's candidacy for the computer artist position, creating the file of letters, and encouraging faculty members with negative things to say about Stavropoulos to interview with the third-year review committee. Though these are not actions appearing on the *McCabe* list of adverse employment actions, we have never held that the list cannot be expanded, so long as the action impacts an important condition of employment.[10] *Cf.*

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[9] Because the district court simply relied on its analysis of whether there was an adverse employment action for purposes of Stavropoulos's Title VII claim against the Board, it did not separate Firestone and Squires's actions in determining whether either of them had taken an adverse action against her. We must do this, however, because Stavropoulos sues these Defendants individually under § 1983, and does not allege that they conspired together to retaliate against her in violation of the First Amendment. Likewise, we do not consider conduct which we considered with relation to the Board, but which cannot be attributed to Firestone or Squires.

[10] *But see Rogers v. Miller*, 57 F.3d 986, 992 (11th Cir. 1995) (concluding that defendants, accused of threatening employees in

Breaux v. City of Garland, 205 F.3d 150, 157-59 (5th Cir. 2000) (noting that the Fifth Circuit has declined to expand the list beyond discharges, demotions, refusals to hire or promote, reprimands, and punitive transfers to avoid enmeshing federal courts in trivial employment matters, noting that "some benefit must be denied or some negative consequence must impinge on the Plaintiff's employment before a threat of discharge is actionable," citing *Bickel*, 632 F.2d at 1255 n.6). Taken together or separately, Firestone's acts fail to rise to the level of an adverse employment action because they had no impact on an important condition of Stavropoulos's job, such as her salary, title, position, or job duties. *Cf. Pierce v. Tex. Dept. of Crim. Justice, Inst. Div.*, 37 F.3d 1146, 1150 (5th Cir. 1994) (holding that threatening an employee to mind her own business, investigating her, videotaping her without her permission, and forcing her to take a polygraph, all in retaliation for employee's speech, were not adverse employment actions because they had no effect on the conditions of her employment, even though they may have had the effect of chilling her speech).

As to Squires, Stavropoulos points to his preparing and reading to the faculty the mental illness memo as an adverse action. Like Stavropoulos's allegations regarding Firestone, this is not substantial enough to be actionable because it had no effect on an important condition of Stavropoulos's employment. *Cf. Breaux*, 205 F.3d at 158-59 (holding that, among other things, requiring an employee to undergo a psychological evaluation following the employee's intemperate remarks to a coworker was not an adverse employment action, where it had no effect on an important condition of his employment).

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retaliation for the employees' political statements, were shielded by qualified immunity from First Amendment retaliation claims, as "no caselaw existing at the time of these events clearly established that such conduct, under the circumstances, constituted 'adverse employment action' prohibited under the First Amendment").

The district court correctly held that Stavropoulos failed to show an adverse employment action, and therefore failed to establish a constitutional violation by either Firestone or Squires. And, even if we had found that Firestone or Squires's actions amounted to a violation of Stavropoulos's First Amendment rights, our discussion of the caselaw in this area shows that there was no clearly established law to put them on notice that their actions were a violation. Thus, the district court properly held that Firestone and Squires were shielded by qualified immunity.

VI. CONCLUSION

Because Stavropoulos failed to establish a prima facie case of retaliation under Title VII against the Board, and because Firestone and Squires are entitled to qualified immunity from her First Amendment retaliation claims, the district court properly entered summary judgment for the Defendants.[11]

AFFIRMED.

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[11] Stavropoulos also appeals the district court's granting Defendant Nix summary judgment on Stavropoulos's First Amendment retaliation claim. But, on appeal, she attributes to Nix none of the actions she contends were retaliatory. Thus, we affirm the district court's judgment as to Nix without further discussion.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

CAROL STAVROPOULOS,
PLAINTIFF-APPELLANT,
v.
EVAN FIRESTONE, W. ROBERT NIX, WILLIAM SQUIRES,
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
DEFENDANTS-APPELLANTS.

3:97-CV-95 (F)

Opinion Filed Mar. 12, 2002

Before DUROSS FITZPATRICK, District Judge

ORDER

Before the Court are motions for summary judgment filed by Defendant Board, Defendant Firestone, Defendant Nix, and Defendant Squires. Plaintiff has filed suit against Defendants under 42 U.S.C.A. § 1983 for violations of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, Title VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, and the Americans with Disabilities Act.

I. FACTUAL BACKGROUND

Plaintiff obtained employment with the University of Georgia in 1993 as a professor in the School of Art within the Art Education program. At all times relevant to this action, Defendant Firestone was the Director of the School of Art and Defendant Nix was the Chairman of the Art Education

program. Additionally, Dr. John Morrow served as Associate Dean of the School of Art until succeeded by Dr. Hugh Ruppersburg in 1996. Dr. Wyatt Anderson was Dean of the School of Art.

During the fall semester of 1994, Defendant Firestone selected Plaintiff and five others to serve on a search committee that was charged with finding a suitable candidate for the computer artist position. During the next few months, the committee met and reviewed applicants. Plaintiff contends that from the beginning, the majority of the committee had already made a decision that Dr. David Kaufman, a male candidate, should be hired. However, Plaintiff and another committee member, Dr. Bradley Tindall, both felt that Dr. Ann Marie LeBlanc, a female, was a better qualified candidate than Dr. Kaufman. Throughout the process, Plaintiff challenged the majority's support for Dr. Kaufman, and she contends that she voiced concerns that Dr. LeBlanc was not being given fair treatment. Defendants respond that Plaintiff voiced these concerns to the committee inappropriately by yelling and becoming violent. Despite the concerns of Plaintiff and Dr. Tindall, the committee ultimately selected Dr. Kaufman by a vote of four to two; Plaintiff and Dr. Tindall dissented.

On March 22, 1995, the committee presented its recommendation to a meeting of the full faculty of the art department. Plaintiff and Dr. Tindall also presented their minority view. The majority of the faculty voted in favor of hiring Dr. Kaufman. After this decision, on March 25, 1995, Plaintiff and Dr. Tindall informed Defendant Firestone of their intent to file a minority report to Dean Anderson. They immediately filed the report. In addition to addressing the qualifications of Dr. LeBlanc, the report stated:

> A final concern is the proactive recruitment policy currently in place within the University. In the computer field generally, men comprise the vast majority of

> teaching and other professional positions. We feel that our support of a candidate like Ann Marie LeBlanc will not only help diversify the field, but may serve as an example for women and other underrepresented groups.

Despite both the report and concerns of Plaintiff and Dr. Tindall, the administration deferred to the art department's decision in deciding to hire Dr. Kaufman. Additionally, in response to the concerns voiced by Plaintiff and Dr. Tindall, Defendant Firestone sent a memorandum to both Plaintiff and Dr. Tindall expressing disapproval with their intentions to press their minority position so far because the committee acted only as an advisory body. Copies of the memorandum were also sent to Dean Anderson and Assistant Dean Morrow.

In April 1995, Dr. LeBlanc sent a letter to the University's Legal Affairs Department expressing concerns that she had been discriminated against on the basis of gender during the selection process for the computer artist position. Around that time, Plaintiff took affirmative steps to support Dr. LeBlanc's contentions of discrimination. For example, Plaintiff contacted Pat DelRey, a faculty member in the Women's Studies Department, to intercede on behalf of Dr. LeBlanc and assist in the complaint of discrimination. Plaintiff raised this issue soon after the committee's recommendation to hire Dr. Kaufman. Defendant Firestone admits that he learned of Plaintiff's involvement in making allegations of gender discrimination only a few weeks after the faculty vote.

In the spring of 1995, the majority of senior faculty of the School of Art voted not to renew Plaintiff's employment contract for the 1996-1997 academic year. Defendants contend that the faculty made this decision because Plaintiff did not appear to behave professionally or congenially toward other professors. They then cited several such

examples of Plaintiff's conduct that supported that conclusion, including her questioning the honesty of her department colleagues and her reference to others in the department as being "800- or 900-lb. gorillas." Defendants also contend that the School of Art never notified Plaintiff of this recommendation of non-renewal. Nevertheless, Plaintiff did learn of the non-renewal vote, and she subsequently complained to the Dean's office about this vote. At the request of Dr. Morrow, and in response to this complaint, Defendant Firestone began to maintain a "separate personnel file," which was given to Associate Dean Morrow. To create this file, Defendant Firestone requested letters and evaluations from other faculty members concerning Plaintiff's behavior and job performance. However, upon reviewing both this file and the records of the committee's non-renewal decision, Associate Dean Morrow and Dean Anderson decided not to support the non-renewal vote; instead, they offered Plaintiff a new employment contract for the 1996-1997 academic year. Associate Dean Morrow stated that he decided to reject the committee's recommendation because it was too difficult to reconcile Plaintiff's excellent performance evaluations and the vote to terminate.

During the 1995-96 academic year, Plaintiff made a request to be considered for early tenure and promotion. However, in February 1996, the tenured faculty voted to deny this request. The next month, Plaintiff requested a special review committee on the matter, but the tenured faculty voted against the appointment of such a committee. In support of this decision, Defendants have referred to the University's policy that all faculty must undergo a five-year probationary period before receiving promotion or tenure. At the time of Plaintiff's early request, she was still in her third year as a professor at the University - still within the minimum probationary period. In addition to this policy, Defendants note that there were concerns that Plaintiff was not yet ready

for promotion or tenure due to the lacking strength of her publications.

Toward the end of that same year, Plaintiff was also to undergo her third-year review, a process used by the faculty to assess a professor's progress toward attaining tenure. On May 1, 1996, Associate Dean Ruppersburg voiced concerns about bias in Plaintiff's upcoming review due to recent events, but he stated that Plaintiff's "separate personnel file" would not be used and that Plaintiff would have the opportunity to respond to the committee's report. Additionally, to mitigate any bias in the process, three of the four review committee members came from outside the Art Education program. Defendant Firestone submitted a fact memorandum discussing events concerning Dr. LeBlanc and Plaintiff's involvement with claims of discrimination. Defendant Firestone also allegedly solicited faculty members to speak to the committee about negative experiences with Plaintiff. During the review, some members asked Plaintiff questions about her mental health and related medications that she may have taken. Defendant Squires prepared a memorandum discussing matters related to these concerns that Plaintiff suffered from such a mental illness. Plaintiff now contends that the committee wrongfully perceived her as having a mental illness.

Defendants have cited several instances in support of these perceptions and concerns that Plaintiff was, in fact, suffering from a mental illness. They contend that over the years, she has been treated with Zoloft, Diazepam, Wellbutrin, and Prozac. They also contend that she has suffered from anxiety and depression, which originated from marital problems. Additionally, during the spring quarter of 1997, Plaintiff took medical leave because she suffered from migraine headaches, and she then became addicted to narcotics.

On May 27, 1996, the third-year review committee presented its report to the tenured faculty who were meeting

to vote on the renewal of Plaintiff's 1997-1998 employment contract. Plaintiff was allowed to present her responses to the report. The report discussed Plaintiff's public hostility toward others as creating a difficult work environment. It also discussed concerns about Plaintiff giving all "A's" to a large number of students as being the source of good teaching evaluations. During the course of the meeting, Defendant Squires read his memorandum on mental illness. Defendant Squires then expressed reservations about reading Plaintiff's response to the committee report. At the conclusion of these proceedings, the tenured faculty voted not to renew Plaintiff's contract for 1997-1998. In addition to the problems cited in the report, Defendants justify this decision based on Plaintiff's behavior when talking to students, failure to meet with students and canceling classes, and errors in advising students on courses. On June 13, 1996, Defendant Firestone informed Plaintiff of the non-renewal vote.

Plaintiff then filed a grievance with the College of Arts & Sciences Faculty Senate Grievance Panel, which had a hearing beginning on June 9, 1997. Plaintiff was represented by an attorney at these proceedings. On June 23, 1997, the Panel issued a report stating that the decision not to renew Plaintiff's contract had resulted from discrimination against her on the basis of a perceived disability and gender, and retaliation for her conduct regarding the 1995 computer artist position selection. Plaintiff, therefore, retained her position as professor for the 1997-1998 academic year and received no loss of pay or benefits. No disciplinary action was taken against Defendants, and Plaintiff was not reimbursed for her legal costs.[1]

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[1] Subsequent to the original filing of this action, but prior to Plaintiff's amended complaint, Plaintiff was due to be considered for promotion and tenure by the 1997-1998 review committee. The promotion and tenure review panel, which consisted of full

II. DISCUSSION

A. Standard of Review

Summary judgment must be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A genuine issue of material fact necessary to defeat a properly supported motion for summary judgment arises only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing a motion for summary judgment, the court must review all the evidence in the record while "draw[ing] all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."

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professors from outside of Plaintiff's department, voted four to three against her promotion and five to two against tenure. Despite the occurrence of this event prior to Plaintiff's filing of her amended complaint, and despite the mention of this event on several occasions in Defendants' briefs, the Court notes that this event is not relevant to the current matter for several reasons.

First, while the complaint does state that she was "subjected to malicious and retaliatory action by defendants in the tenure review process," Plaintiff gives no clear indication that this allegation applies to both the 1996 denial of early review and the 1997-1998 denial of tenure. Second, the complaint provides a factual basis for only the 1996 promotion and tenure decision, and makes no mention whatsoever of the 1997-1998 decision. Third, Plaintiff has mentioned the events surrounding the 1997-1998 decision only in *response* to Defendant's discussion of these matters in their statements of facts. Finally, the fact that Plaintiff has brought a subsequent suit against Defendants for numerous denials of promotion and tenure, one of which was the 1996 decision, provides strong evidence that Plaintiff did not intend to file redundant claims. Accordingly, the matter currently before the Court does not involve claims for the 1997-1998 denial of tenure and promotion.

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); *see also Maynard v, Williams,* 72 F.3d 848, 851 (11th Cir. 1996).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact" and that entitle it to a judgment as a matter of law. *Celotex Corp.,* 477 U.S. at 323 (internal quotation marks omitted). If the moving party discharges this burden, the burden then shifts to the nonmoving party to go beyond the pleadings and present specific evidence showing that there is a genuine issue of material fact (i.e., evidence that would support a jury verdict) or that the moving party is not entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(e); *see also CelotexCorp.,* 477 U.S. at 324-26. This evidence must consist of more than mere conclusory allegations or legal conclusions. *See Avirgan v. Hull,* 932 F.2d 1572, 1577 (11th Cir. 1991). Under this scheme, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

B. Title VII Claims

1. Proper Parties

Plaintiff has brought Title VII claims against Defendants for retaliation and for disparate treatment based on gender. However, the Court finds it necessary to discuss which Defendants are properly sued under this claim. As to Plaintiff's Title VII claims against Defendants Firestone, Nix, and Squires, "individual capacity suits under Title VII are inappropriate," and such suits should be brought only against the employer. *Busby v. City* of *Orlando,* 931 F.2d 764, 772 (11th Cir. 1991) (per curiam). Plaintiff's claims

against Defendants Firestone, Nix, and Squires, in their official capacities, are likewise inappropriate because such claims would be redundant of claims against Defendant Board. *See id.* Accordingly, Plaintiff's Title VII claims are appropriate only against Defendant Board, and the motions for summary judgment by Defendants Firestone, Nix, and Squires regarding Plaintiff's Title VII claims against them in their official and individual capacities are hereby GRANTED. The Court will now turn the merits of these claims for retaliation and discrimination against Defendant Board.

2. Title VII Retaliation Claims

Analysis of Title VII retaliation claims is governed by the framework developed in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-03 (1973), and *Texas Department of Community Affairs v. Burdline*, 450 U.S. 248, 253 (1981). *See Goldsmith v. City of Atmore,* 996 F.2d 1155, 1162-63 (11th Cir. 1993). In accordance with this framework, the plaintiff first bears the burden of establishing a prima facie case of retaliation. *See McDonnell Douglas Corp.,* 411 U.S. at 802; *Goldsmith,* 996 F.2d at 1263. If the plaintiff successfully establishes a prima facie case of retaliation, then the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for its conduct. *See Burdine,* 450 U.S. at 253; *Goldsmith,* 996 F.2d at 1263. Upon the defendant's production of a legitimate nondiscriminatory reason, the burden shifts back to the plaintiff to demonstrate, by a preponderance of the evidence, that this proffered explanation is merely pretext and that the defendant's real purpose was discriminatory. *See Burdine,* 450 U.S. at 253; *Goldsmith,* 996 F.2d at 1263.

a. Prima Facie Case

Defendant Board first contends that Plaintiff has failed to establish a prima facie case of retaliation. To make out a prima facie case of retaliation, a plaintiff must show that: (1) she engaged in statutorily protected activity, (2) she suffered

an adverse employment action, and (3) the adverse employment action was causally linked to the protected activity. *See Bass v. Bd.* of *County Comm'rs,* 256 F.3d 1095, 1117 (11th Cir. 2001); *Goldsmith,* 996 F.2d at 1163. Defendants contend that: (1) Plaintiff did not engage in any statutorily protected activity, (2) Plaintiff did not suffer from an adverse employment action, and (3) even assuming the satisfaction of the first two prima facie retaliation elements, Plaintiff has shown no causal link between an adverse employment action and any such activity.

i. Statutorily Protected Activity

An employee is protected from discrimination under the opposition clause if "he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C.A. § 2000e-3(a) (West 1994). Moreover, to fall within the scope of the opposition clause, it is necessary that the plaintiff have "a good faith, reasonable belief that her employer has engaged in unlawful discrimination." *Clover v. Total Sys. Servs., Inc.,* 176 F.3d 1346, 1351 (11th Cir. 1999) (internal quotation marks omitted). The objective reasonableness of this belief "must be measured against existing substantive law." *Id.* Here, Defendant Board claims that Plaintiff never believed Dr. LeBlanc was subjected to discriminatory animus. Rather, Defendant Board contends that Plaintiff challenged the selection of Dr. Kaufman solely out of the belief that favoring him as an internal candidate was unfair to other candidates, such as Dr. LeBlanc. Therefore, according to Defendant Board, while Plaintiff disagreed with the hiring criteria, she did not actually believe that others on the committee were in violation of Title VII or that they favored Dr. Kaufman because he was male. Plaintiff responds that she did believe that Defendant Board's selection of Dr. Kaufman was discriminatory in violation of Title VII. For the following reasons, the Court finds that Plaintiff has met her burden of demonstrating involvement in statutorily protected activity under the opposition clause.

The record reflects sufficient evidence to support the inference that Plaintiff challenged the computer search results because of her concerns about gender discrimination. Within only a few weeks of the completion of the computer artist search, and prior to any of the allegedly adverse employment actions, Defendant Firestone learned that Plaintiff was complaining about gender discrimination. Plaintiff also helped Dr. LeBlanc to file a discrimination claim concerning the selection process and spoke to other faculty to gather support on this matter. She also, in her deposition, states that she spoke out because of her concern that the conduct was "clearly illegal." Furthermore, the Court finds this subjective belief to have been objectively reasonable. As an initial matter, other individuals have agreed that a reasonable individual could have viewed the decision making process as being discriminatory. Associate Dean Morrow, for example, stated that such a view would seem reasonable based on the fact that Dr. LeBlanc's interview and credentials both were superior to those of Dr. Kaufman. Additionally, case law supports such a belief; for example, it appears that Dr. LeBlanc could have at least made out a prima facie case of discrimination based on the fact that the position appears to have been given to a less-qualified individual who was outside of her protected class. *See, e.g., McDonnell Douglas Corp.,* 411 U.S. at 802; *Rutstein v. Avis Rent-A-Car Sys., Inc.,* 211 F.3d 1228, 1235 n.14 (11th Cir. 2000). Viewing the circumstances as a whole, the Court finds that Plaintiff has established a genuine issue of material fact as to whether she harbored an objectively reasonable belief that Dr. LeBlanc was the victim of gender discrimination.

ii. Adverse Employment Action

Defendant Board also contends that Plaintiff has not demonstrated that she suffered from an adverse employment action. Plaintiff responds by noting that she suffered several separate adverse employment actions: (1) the 1995 vote not

to renew Plaintiff's contract for the 1996-1997 academic year, (2) the 1996 denial of early consideration for promotion and tenure, and (3) the 1996 third-year review and vote not to renew Plaintiff's contract for the 1997-1998 academic year. However, Defendant Board argues that neither of the decisions to deny renewal of Plaintiff's contract constituted an adverse employment action for the purpose of establishing a prima facie case of gender discrimination. According to Defendant Board, because each of these initial votes to renew her contract was overturned, and because neither prevented Plaintiff from working in her same position and capacity, neither constituted an adverse employment action. Plaintiff responds that despite the fact that these initial actions did not ultimately affect her position, each caused her to incur substantial legal expenses and to suffer from emotional distress.

In determining whether conduct constitutes an adverse employment action for purposes of Title VII, the Court looks to federal, rather than state, law. *See Hinson,* 231 F.3d at 828-29. The Eleventh Circuit has noted that:

> An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her or employment opportunities, or adversely affects his or her status as an employee. Conduct that falls short of an ultimate employment decision must meet some threshold level of substantiality to be cognizable under the anti-retaliation clause of Title VII. While not everything that makes an employee unhappy is an actionable adverse action, conduct that alters

> an employee's compensation, terms, conditions, or privileges of employment does constitute an adverse action under Title VII.

Bass, 256 F.3d at 1118 (citations and internal quotation marks omitted). Therefore, when an employment action results in a reduction of pay, prestige, or responsibility, it is considered adverse. *See Hinson,* 231 F.3d at 829; *Doe v. Oekalb County Sch. Dist.,* 145 F.3d 1441, 1448 (11th Cir. 1998). In contrast to those cases involving ultimate employment decisions affecting an employee's status or benefits, the non-renewal decisions raised by Plaintiff were temporary decisions that never culminated in a final decision and never affected her position or salary. In its examination of such temporary employment decisions, the Eleventh Circuit has recognized "that the decision to reprimand or transfer an employee, if rescinded before the employee suffers a tangible harm, is not an adverse employment action." *Pennington v. City of Huntsville,* 261 F.3d 1262, 1267 (11th Cir. 2001). Only when the employee "loses pay or an employment benefit" due to the delay does temporary conduct constitute an adverse action. *Id.* Generally, such benefits involve the delay of bonuses or increased salary resulting directly from the temporary decision. *See id.* Here, Plaintiff suffered no loss of pay or benefits due to either of the non-renewal decisions; rather, each of these decisions was overturned before it was allowed to have any tangible effect on Plaintiff's employment status, and she retained her same position and pay while the decisions were reconsidered. In the end, the only harms that Plaintiff contends these temporary decisions caused were those of emotional distress and costs arising from related legal actions. These simply do not suffice to

render Defendant Board's temporary decisions adverse employment actions for Title VII purposes.[2]

In contrast, the 1996 denial of Plaintiff's request for early promotion and tenure review constitutes an adverse employment action. This event involved a decision directly related to the status of Plaintiff's salary and employment benefits. Furthermore, even though the 1996 decision was not final in the sense that it did not present a permanent bar to her future chances for promotion or tenure, it effectively resulted in the immediate denial of a potential raise in salary and improvement in benefits. Therefore, unlike the temporary denial of contract renewal that ultimately did nothing to affect Plaintiff's job, the 1996 denial of early review for promotion and tenure created an immediate bar to material benefits to which Plaintiff may have otherwise been entitled. Accordingly, the denial of early review constitutes

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[2] Plaintiff has also complained that these reviews and decisions led to the production of adverse performance reviews. However, the Eleventh Circuit has warned that courts should be "reluctant to treat job performance memoranda as actionable under Title VII where they do not trigger any more tangible form of adverse action such as loss in benefits, ineligibility for promotional opportunities, or more formal discipline." *Davis v. Town of Lake Park,* 245 F.3d 1232, 1241 (11th Cir. 2001); *see also Lucas v. W. W. Grainger, Inc.,* 257 F.3d 1249, 1261 (11th Cir. 2001). Here, the only potential effects that these reviews would have had on her benefits and promotion would have been through committee decisions regarding promotion and tenure. As previously discussed, however, the only such decision of which Plaintiff has complained was the 1996 denial of early promotion and tenure consideration. The performance reviews that occurred in 1996 could not have affected the chances of Plaintiff receiving promotion and tenure until the 1997-1998 decision, when the tenure and promotion probation period had expired and when the University reached an ultimate decision on the mailer. However, as previously noted, Plaintiff has not brought claims in this action concerning that decision.

an adverse employment action for purposes of Title VII; the other conduct simply does not meet the requisite threshold of substantiality.

iii. Causal Link Between Adverse Employment Action and Protected Activity

Defendant Board also contends that, even assuming that Plaintiff suffered an adverse employment action and that she spoke out under the protection of the opposition clause, Plaintiff has failed to establish the causal link between such an adverse action and the statutorily protected activity. To establish a causal link of retaliation, it is necessary, at a minimum, for a plaintiff to demonstrate that the "'employer was actually aware of the protected expression at the time it took the adverse employment action,'" *Griffin v. GTE Fla., Inc.,* 182 F.3d 1279, 1284 (11th Cir. 1999) (per curiam) (quoting *Goldsmith,* 996 F.2d at 1163). At the same time, the Eleventh Circuit has recognized that "the causal link element is construed broadly so that 'a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated.'" *Pennington,* 261 F.3d at 1266 (quoting *EEOC v. Reichhold Chem. Inc.,* 988 F.2d 1564, 1571-72 (11th Cir. 1993)).

Here, it appears that Plaintiff has met the minimal burden of demonstrating a causal link between her statutorily protected activity and the denial of her requested consideration for early promotion and tenure. The record provides ample evidence that Plaintiff made Defendant Board aware of her allegations of gender discrimination on a number of occasions. *See Clover,* 176 F.3d at 1354 (noting that an employer's prior knowledge of the protected speech is circumstantial evidence of a causal link). She produced the minority memorandum in response to the committee decision concerning Dr. LeBlanc, and she discussed her concerns about discrimination with Associate Dean Morrow. Even Defendant Firestone admits that he knew that Plaintiff raised

concerns about gender discrimination long before a decision regarding that request was reached. Moreover, while the fact that the early tenure and promotion decision occurred about one year after the protected speech may cut against inferring a causal link, the composition of the decision making body that denied early review overcomes this negative inference. In fact, it is highly likely that a number of those tenured faculty who participated in the denial also participated in the prior 1994-1995 decision not to renew Plaintiff's contract, and, therefore, they would have previously heard about Plaintiff's protected activity. Such prior knowledge may well have biased their decision to deny early review. Accordingly, Plaintiff has established a prima facie case of retaliation regarding only the denial of her request for early promotion and tenure in 1996.

b. Legitimate Nondiscriminatory Reason

Because Plaintiff has established a prima facie case of retaliation, the burden of production now shifts to Defendant Board to provide "reasons for its actions, which *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507 (1993); *see also Burdine,* 450 U.S. at 253. However, because this is a burden of production, and not a burden of proof, the Court's determination as to whether Defendant Board has met its burden "can involve no credibility assessment." *St. Mary's Honor Ctr.,* 509 U.S. at 509. Here, Defendant Board claims Plaintiff's request for early consideration was not granted because she had not been a professor at the University long enough to receive promotion or tenure. More specifically, Defendant Board contends that, at the time Plaintiff made her request, the University policy required professors to serve a minimum probationary period of five years before being reviewed. Plaintiff, however, was still serving her third year at the time of the request. Additionally, Defendant Board points to concerns about the

strength of Plaintiff's publications at the time of the request. This showing is sufficient to satisfy Defendant Board's burden.

c. Pretext

Faced with Defendant Board's legitimate nondiscriminatory reason, Plaintiff "must be afforded the 'opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for the discrimination.'" *Reeves,* 530 U.S. at 143 (quoting *Burdine,* 450 U.S. at 253). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated . . . [However, t]his is not to say that such a showing by the plaintiff will *always* be adequate." *Id.* at 148; *see also Hinson,* 231 F.3d at 831. Additionally, "conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where an employer has offered extensive evidence of legitimate, nondiscriminatory reasons for its actions." *Carter v. City* of *Miami,* 870 F.2d 578, 585 (11th Cir. 1989) (internal quotation marks omitted).

Therefore, in determining whether summary judgment is appropriate, the Court should consider "'the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered.'" *Hinson,* 231 F.3d at 832 (quoting *Reeves,* 530 U.S. at 148-49). For the following reasons, the Court finds that Plaintiff has not met this burden.

Here, Plaintiff has not demonstrated a basis for which a reasonable fact-finder could determine that Defendant Board's proffered reasons are pretextual. Defendant Board explained that Plaintiff's request did not comply with the

University's policy of imposing a five-year probationary period on its faculty. Yet Plaintiff has failed to direct the Court to any instances in which the University did not comply with that policy. Furthermore, Plaintiff has not challenged the concerns about the strength of her publications. While it is true that a plaintiff's prima case may be combined with evidence of pretext to establish an inference of discrimination, *see Reeves*, 530 U.S. at 148, Plaintiff has made no such effort to disprove Defendant Board's reason. With no evidence of pretext, Plaintiff's retaliation claim under Title VII does not survive summary judgment. Accordingly, Defendant Board's motion for summary judgment regarding Plaintiff's retaliation claim under Title VII is hereby GRANTED.

3. Title VII Disparate Treatment Claims

Plaintiff also claims that Defendant Board discriminated against her on the basis of gender in violation of Title VII. Because Plaintiff has not provided direct evidence of discrimination, the Court must determine whether she has provided sufficient indirect evidence to support an inference of discrimination. As with Title VII claims for retaliation, in analyzing a Title VII claim for disparate treatment based on indirect evidence, courts have consistently applied the burden-shifting framework set out in *McDonnell Douglas* and *Burdine*. *See, e.g., Durley v. APAC, Inc.*, 236 F.3d 651, 656-59 (11th Cir. 2000). In light of this framework, Defendant Board contends that Plaintiff's claim fails because (1) she has not established a prima facie case of discrimination, and (2) she has not demonstrated that Defendant Board's legitimate nondiscriminatory reasons for acting are pretextual. For the following reasons, the Court finds that Plaintiff has not established a prima facie case of discrimination.

"Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to

permit an inference of discrimination." *Holifield v. Reno,* 115 F.3d 1555, 1562 (11th Cir. 1997) (per curiam). In *McDonnell Douglas,* the Supreme Court required a plaintiff seeking to establish a prima facie case of race discrimination through the use of indirect evidence to demonstrate that (1) she was within a protected class, (2) she suffered an adverse employment action, (3) similarly situated individuals outside the protected class were treated differently, and (4) she was qualified for the job. *See McDonnell Douglas Corp.,* 411 U.S. at 804; *see* also *Durley,* 236 F.3d at 655-56. Defendant Board contends that the 1995 and 1996 non-renewal decisions did not constitute adverse employment actions and that Plaintiff has not shown that similarly situated males were treated differently than she.

a. Adverse Employment Action

As previously recognized, the only decision by Defendant Board that could constitute an adverse employment action for purposes of Title VII was its 1996 denial of Plaintiff's request for early promotion and tenure review. *See supra* Part II.B.2.a.ii.

b. Similarly Situated Individuals Outside the Protected Class

Defendant Board also contends that Plaintiff has failed to make out a prima facie case regarding the denial of early promotion and tenure review because she has failed to demonstrate that a similarly situated male was treated differently. The only different treatment of which Plaintiff complains is the fact that Dr. Tindall was not subjected to questions about his mental health or medication at during the third-year review. However, for several reasons, this contention does not satisfy Plaintiff's prima facie burden regarding either decision about promotion and tenure.

As an initial matter, Plaintiff has not demonstrated that Dr. Tindall received early promotion or tenure, let alone early consideration. Therefore, Plaintiff has not demonstrated how Defendant Board has treated Dr. Tindall

any differently as to the actual decision to grant or denial of early review.

Plaintiff seeks to save this claim by arguing that the fact that the committee asked her questions about her mental health, and did not ask Dr. Tindall such questions, constitutes "different" treatment. This argument also fails, however, for two reasons. First, there is no indication that the third-year review, which occurred *after* the denial of early consideration for promotion and tenure, is probative of discriminatory animus being a motivating factor in the denial. Second, even assuming that conduct *subsequent* to the decision could provide evidence of discrimination, Defendant Board's treatment of Dr. Tindall does not create an inference of disparate treatment based on gender. Title VII does not guarantee that all individuals must be treated exactly the same in all aspects of the job. Quite the contrary, "Title VII requires employers to treat their employees as *individuals,* not 'as simply components of a racial, religious, sexual or national class.'" *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Compo Plans v. Norris,* 463 U.S. 1073, 1083 (1983) (quoting *City of L.A., Dep't of Water & Power v. Manhart,* 435 U.S. 702, 708 (1978) (emphasis added). Furthermore, employees are not entitled to identical treatment in the workplace under Title VII. *See Worthy v. Widnall,* 900 F.Supp. 475, 481-82 (M.D. Ga. 1995) (noting that unequal time division between workers for "undesirable assignments" does not constitute different treatment). Here, there is no evidence that the panel treated Plaintiff any differently because of her gender; rather, the panel asked her questions about her mental health only because they were relevant to her individually. In fact, it is questionable whether or not Dr. Tindall was in fact similarly situated for purposes of the review. *See Marshall v. W. Grain* Co., 838 F.2d 1165, 1167-68 (11th Cir. 1988) (per curiam) (recognizing that whether comparators were similarly situated is a "crucial" element in employment discrimination cases). The panel had knowledge about the

mental history only of Plaintiff. There is no indication that the panel had any corresponding information regarding Dr. Tindall that would warrant similar concerns about his mental health. Moreover, the fact that Plaintiff was asked questions about her mental state (in and of itself) provides no indication that Defendant Board harbored any discriminatory animus against her based on *gender*. Rather, any difference in questions appears to have arisen from the fact that, by the very nature of an interview, a panel must ask questions on matters specific to the interviewee. In any case, neither Plaintiff nor Dr. Tindall received different treatment as to the ultimate employment decision at issue - the grant or denial of early promotion and tenure.

Because Plaintiff has not demonstrated that she was treated differently than a similarly situated male employee, she has failed to establish a prima facie case for disparate treatment under Title VII. Accordingly, Defendant Board's motion for summary judgment as to Plaintiff's Title VII claim for disparate treatment is hereby GRANTED.[3]

C. Title IX Claims

Plaintiff has also brought Title IX claims against Defendants. However, for several reasons, each of Plaintiff's claims must fail. As an initial matter, the law is clear that a Plaintiff cannot sue individuals under Title IX. *See Hartley v. Parnell,* 193 F.3d 1263, 1270 (11th Cir. 1999) (recognizing that "[i]ndividual school officials . . . may not be held liable under Title IX"). Rather, only recipients of federal funding can be held liable under Title IX. *See Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 638-39 (1999). Therefore, Plaintiff's Title IX claims

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[3] Even assuming that Plaintiff had demonstrated a prima facie case of discrimination, Defendant's motion for summary judgment as to this claim must ultimately be granted. The Court has already determined that she has failed to establish that Defendant Board's legitimate nondiscriminatory reasons for acting were pretextual. *See supra* Part II.B.2.c.

against Defendants Firestone, Nix, and Squires must fail as a matter of law. Furthermore, her claims against Defendant Board must similarly fail because they are preempted by her claims under Title VII.

While the Eleventh Circuit has not yet addressed the issue of whether Title VII preempts Title IX, the Court finds substantial support for recognizing this preclusive effect. Both the Fifth and Seventh Circuits have similarly recognized Title VII's preclusive effect on Title IX claims. *See Waid v. Merrell Area Pub. Sch.,* 91 F.3d 857, 861-62 (7th Cir. 1996); *Lakoski v. James,* 66 F.3d 751, 753-58 (5th Cir. 1995). In reaching this conclusion in *Lakoski,* the Fifth Circuit recognized a concern that allowing plaintiffs to bring such claims through Title IX would allow litigants to bypass the procedural safeguards set out by Title VII. *See Lakoski,* 66 F.3d at 753. This concern has been echoed by several district courts within the Eleventh Circuit (including this Court) that have also recognized such a preclusive effect when the relief sought under Title IX is available under Title VII as well. *See Morris v. Wallace Cmty. Coll.-Selma,* 125 F.Supp.2d 1315, 1343 (S.D. Ala. 2001); *Blalock v. Dale County Bd. of Educ.,* 84 F.Supp.2d 1291, 1297-99 (M.D. Ala. 1999); *Gibson v. Hickman,* 2 F.Supp.2d 1481, 1483-84 (M.D. Ga. 1998). The Court agrees that these concerns weigh against allowing parallel claims under Title VII and Title IX and therefore finds that Plaintiff's Title IX claim is preempted by her Title VII claim against Defendant Board. Accordingly, Defendants' motions for summary judgment as to Plaintiff's Title IX claims are hereby GRANTED.

D. ADA Claims

Plaintiff also contends that Defendants discriminated against her in violation of Title I of the ADA, which prohibits the States and other employers from "discriminat[ing] against a qualified individual with a disability because of the disability." 42 U.S.C.A. 12112(a) (West 1995). For the following reasons, however, the Court

finds that none of her ADA claims survives summary judgment. Because the ADA provides for relief against only the employer, Plaintiff's claims against Defendants Firestone, Nix, and Squires, in their individual capacities, must fail. *See Mason v. Stallings,* 82 F.3d 1007, 1009 (11th Cir. 1996) (recognizing that the ADA "does not provide for individual liability, only for employer liability"); *see also Scott v. Estes,* 60 F.Supp.2d 1260, 1267 (M.D. Ala. 1999). Additionally, as with Title VII, claims against these Defendants in their official capacities would be duplicative of those claims brought against Defendant Board. *See Busby,* 931 F.2d at 772.

Finally, Plaintiff's ADA claim against Defendant Board is barred by the Eleventh Amendment. The Eleventh Amendment prohibits suits against state entities and state officials acting in their official capacities in federal court for monetary relief, unless the state either consents to suit or waives its immunity or unless Congress abrogates that immunity by statute. *See Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 72-73 (1996); *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 99 (1984). Because Plaintiff has satisfied none of these requirements, the Eleventh Amendment bars Plaintiff's ADA claims against Defendant Board.

As a preliminary matter, Congress has not abrogated the States' Eleventh Amendment immunity in its passage of the ADA. *See Bd. of Trs. of Univ. of Ala. v. Garrett,* 531 U.S. 356, 374 (2001) (finding no abrogation because Title I of the ADA does not address "a pattern of discrimination by the States which violates the Fourteenth Amendment"); *see also Seminole Tribe* of *Fla.,* 517 U.S. at 72-73. Nor has Plaintiff demonstrated that Georgia has either waived its Eleventh Amendment immunity or consented to be sued in federal court. In order to demonstrate such consent or waiver, Plaintiff must first demonstrate that Georgia has made "a clear declaration that it intends to submit itself to [federal] jurisdiction" and thereby waived any Eleventh

Amendment immunity for such suits. *Coll. Say. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999) (internal quotation marks omitted); *see also Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 238 n.1 (1985); *Halderman,* 465 U.S. at 99 (noting that this consent must be "unequivocally expressed"). Georgia has made no such statement. In fact, in its provisions concerning sovereign immunity, the Georgia Constitution expressly provides that "no waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state or its departments, agencies, officers, or employees by the United States Constitution." Ga. Const. Art. I, § 2, ¶ 9(f). Additionally, while the Georgia Legislature did waive sovereign immunity with respect to the Georgia Tort Claims Act, that statute also provides that "[t]he State does not waive any immunity with respect to actions brought in the courts of the United States." O.C.G.A. § 50-21-23(b) (1998). Plaintiff likewise fails to direct the Court to any evidence that the State has consented to have this specific action brought before a federal court. Accordingly, Defendants' motions for summary judgment as to Plaintiff's ADA claims are hereby GRANTED.

E. Section 1983 Claims

Before addressing the merits of Plaintiff's § 1983 claims, the Court finds it necessary to determine which Defendants are proper parties. The Court first notes that Plaintiff's claims against Defendant Board brought pursuant to § 1983 fail as a matter of law. Section 1983 provides a procedural mechanism through which a plaintiff can sue a "person who, under color of . . . State" law is responsible for the plaintiff's deprivation of a constitutional right. 42 U.S.C.A. § 1983 (West 1984 & Supp. 2001). However, the Supreme Court has unambiguously recognized that "a State is not a person within the meaning of § 1983." *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 64 (1989); *see also Robinson v. Georgia Dep't of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992). Furthermore, "Congress in passing §

1983, had no intention to disturb the States' Eleventh Amendment immunity" by providing a federal forum for plaintiffs seeking to sue state actors for such violations of their civil liberties. *Will,* 491 U.S. at 66; *see also Alden v. Maine,* 527 U.S. 706, 736 (1999). Therefore, Defendant Board's motion for summary judgment as to all of Plaintiffs § 1983 claims is hereby GRANTED.

Additionally, the Court notes that Plaintiff's § 1983 claims against Defendants Firestone, Nix, and Squires, in their official capacities, must also fail. The Eleventh Circuit has recognized that "when an officer is sued under § 1983 in his or her official capacity, the suit is simply another way of pleading an action against an entity of which an officer is an agent." *Busby,* 931 F.2d at 776 (internal quotation marks omitted); *see also Owens v. Fulton County,* 877 F.2d 947,951 n.5 (11th Cir. 1989) (per curiam). Because § 1983 does not provide a cause of action against Defendant Board, allowing Plaintiff to sue Defendants Firestone, Nix, and Squires in their official capacities under § 1983 would also be inappropriate. Accordingly, the motions for summary judgment by Defendants Firestone, Nix, and Squires as to all of Plaintiffs § 1983 claims against them in their official capacities are hereby GRANTED. Therefore, Plaintiff's § 1983 claims remain only against Defendants Firestone, Nix, and Squires in their individual capacities.

While a government official can be sued under § 1983 in his individual capacity, such an official is sometimes entitled to the affirmative defense of qualified immunity. *See Busby,* 931 F.2d at 772. Here, Defendants Firestone, Nix, and Squires have each properly raised the affirmative defense of qualified immunity to the § 1983 claims discussed below. The Court will therefore examine each of Plaintiff's individual-capacity claims against these Defendants accordingly.

The affirmative defense of qualified immunity serves to protect government officials from being sued for conduct

resulting from the administration of their official duties. The Supreme Court has recognized the policy that "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Therefore. "[q]ualified immunity protects government officials performing discretionary functions from civil trials . . . and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lassiter v. Alabama A&M Univ.,* 28 F.3d 1146, 1149 (11th Cir. 1994) (quoting *Harlow,* 457 U.S. at 815). Analysis of the qualified immunity defense involves a two-part inquiry. *See Priester v. City of Riviera Beach,* 208 F.3d 919, 926 (11th Cir. 2000). First, the defendant asserting this defense must demonstrate that he was acting within the scope of her discretionary authority at the time of the alleged violation. *See id.* Second, if this showing is made, the plaintiff must prove that the defendant's conduct violated some clearly established right. *See id.* Here, Plaintiff has not challenged that Defendants Firestone, Nix, and Squires were acting within the scope of their discretionary authority. Therefore, the Court need determine only whether the conduct violated any clearly established rights. In order to establish the violation of a clearly established right, a plaintiff must first demonstrate that she has suffered from the deprivation of a currently cognizable constitutional right. *See Conn v. Gabbert,* 526 U.S. 286, 290 (1999); *Chesser v. Sparks,* 248 F.3d 1117, 1122 (11th Cir. 2001). If the violation of a currently cognizable right is determined, the plaintiff must then demonstrate that the right was clearly established at the time of the conduct such that a reasonable person would have been put on notice of the constitutional violation. *See Conn,* 526 U.S. at 290; *Chesser,* 248 F.3d at 1122. Having established the standards for analysis in light of the qualified

immunity defense, the Court will now address the merits of each claim.

1. Retaliation in Violation of the First Amendment

Defendants Firestone, Nix, and Squires first contend that Plaintiff has failed to allege a First Amendment retaliation claim under § 1983. As noted above, because this claim involves the defense of qualified immunity, the Court must perform the two-prong analysis to determine whether there was a deprivation of a currently cognizable right, and if so, whether that right was clearly established at the time of the conduct.

Under § 1983, Plaintiff bears the burden of demonstrating that Defendants Firestone, Nix, and Squires, while acting under color of state law, engaged in conduct that violated a currently cognizable constitutional right. In order to succeed on a First Amendment retaliation claim, a plaintiff must demonstrate that the defendant engaged in conduct to retaliate against her for some form of protected speech. This analysis is tempered by two opposing policies: while the government cannot retaliate against a public employee for making protected speech, neither is the public employee's First Amendment speech entitled to absolute protection. *See Morgan v. Ford,* 6 F.3d 750, 753-54 (11th Cir. 1993) (per curiam); *Bryson v. City of Waycross,* 888 F.2d 1562, 1565 (11th Cir. 1989).

The Eleventh Circuit has developed a four-prong test based on Supreme Court precedent for determining whether a defendant has violated this First Amendment right. *See Rice-Lamar v. City of Ft. Lauderdale,* 232 F.3d 836, 841 (11th Cir. 2000); *Bryson,* 888 F.2d at 1565-66. Under the first prong, the Court examines whether the plaintiff's speech constitutes speech on a "matter of public concern." *Rankin v. McPherson,* 483 U.S. 378, 384 (1987). If the expression does not constitute speech on a matter of public concern, then under the second prong the Court weighs the plaintiff's

First Amendment interest against "the interest of the state, as an employer, in promoting the efficiency of the public services it performs." *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Should the plaintiff prevail on this balance, then the Court turns to the third prong to determine whether the speech was a substantially motivating factor for the conduct in question. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977). Finally, if the plaintiff demonstrates that the speech was a substantial factor for the adverse employment action, the fourth prong requires the defendant to prove by a preponderance of the evidence that it would have made the same decision absent the speech in question. *See id.; Bryson,* 888 F.3d at 1566.[4] However, before even engaging in the four-part test described above, a plaintiff must make a threshold showing that she suffered from an adverse employment action. *See McCabe v. Sharrett,* 12 F.3d 1558, 1562 n.3 (11th Cir. 1994).

a. Adverse Employment Action

In order to have a valid First Amendment retaliation claim under § 1983, the form of the retaliation that constitutes the basis of a plaintiff's claim must constitute an adverse employment action. *See id.* at 1563. For purposes of First Amendment analysis, any conduct "that is likely to chill the exercise of constitutionally protected speech" will constitute retaliation. *Goffer v. Marbury,* 956 F.2d 1045, 1049 n.1 (11th Cir.1992). Such action "includes not only discharges, but also demotions, refusals to hire, refusals to promote, and reprimands." *McCabe,* 12 F.3d at 1563; *see also Rutan v. Republican Party,* 497 U.S. 62, 79 (1990). Here, the only adverse employment action for which Plaintiff could bring a

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[4] The first two prongs constitute the *Pickering* balance test and are to be determined by the Court as a matter of law. *See Anderson v. Burke County,* 239 F.3d 1216, 1219-20 (11th Cir. 2001) (per curiam); *Bryson,* 888 F.2d at 1565. The third and fourth prongs of the analysis each involves questions of fact. *See Anderson,* 239 F.3d at 1219-20; *Bryson,* 888 F.2d at 1565.

First Amendment retaliation claim is the 1996 denial of her request for early promotion and tenure.

As discussed in Part II.B.2.a.ii., neither of the votes not to renew her contract had a materially adverse effect on Plaintiff's job. Plaintiff received no loss of benefits or salary, and at no point did she lose her position as professor. Moreover, neither of the initial decisions for non-renewal resulted in an ultimate employment action - in the first instance Dean Anderson decided not to affirm the committee's non-renewal vote; in the second instance, the University's Grievance Committee rectified the decision before any action against Plaintiff was taken. In contrast to those decisions, however, the failure to grant Plaintiff's 1996 request for early promotion and tenure review constitutes an adverse employment action because it may have directly precluded Plaintiff from receiving benefits and a promotion to which she was otherwise entitled.

b. Matters of Public Concern

Defendants Firestone, Nix, and Squires contend that Plaintiff's First Amendment retaliation claims must fail because the speech in question did not involve a matter of public concern. Because workplace speech often does not involve matters of either purely public or purely private concern, courts should determine the "main thrust" of the employee's speech: whether she "spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee." *Morgan,* 6 F.3d at 754. To make this determination, it is necessary to examine the "content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers,* 461 U.S. 138, 147-48 (1983); *see also Maggio v. Sipple,* 211 F.3d 1346, 1352 (11th Cir. 2000). Here, Plaintiff bases her claim on several instances of speech. First, she points to the minority report that she and Dr. Tindall filed at the completion of the search committee's recommendation. She also alludes to her discussion with Associate Dean Morrow about her concerns of gender

discrimination regarding the decision not to hire Dr. LeBlanc, as well as her open support of Dr. LeBlanc's filing of a discrimination claim.

Here, Plaintiff contends that her speech on gender discrimination in the workplace constitutes speech on a matter of public concern. While issues of gender discrimination are generally considered to be matters of great social importance, however, speech on this subject does not constitute speech on a matter of public concern per se. *See Morgan,* 6 F .3d at 755; *Kurtz v. Vickrey,* 855 F .2d 723, 727 (11 th Gir. 1988) (noting that merely because the public would have interest in the speech has little effect on whether a matter is one of public concern). Rather, when the employee's speech primarily involves matters of self-interest, it tends to lose its constitutional protections. The Supreme Court has made it clear that

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147. Therefore, to be protected, it is necessary not only that the speech involve matters of social importance, but also that the speech not be primarily oriented toward improving the plaintiff's own work conditions and environment. *See Morgan,* 6 F.3d at 755 (finding that while the plaintiff's speech dealt with discrimination of a co-worker, the changes sought would improve her own work. conditions and that she "primarily spoke as an employee in order to improve her own work environment"); *Johnson v. Clifton,* 74 F.3d 1087, 1092 (11th Cir. 1996) (recognizing that

speech "motivated by personal concerns" is not protected); *see also Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1540 (11th Cir. 1994) (finding that speech was not self-motivated when it "supported the discrimination and harassment claims of *other* individuals, not of [Plaintiff] herself"); *Marshall v. Allen,* 984 F.2d 787, 796 (7th Cir. 1993) (noting that a male employer's speech in opposition to discrimination against females was protected because it "appear[ed] not to have arisen from a private dispute between himself and the [employer]" and there was "no allegation that Mr. Marshall's speech was tied to a personal interest"). Here, it did not promote Plaintiff's self-interest to voice concerns about gender discrimination in the committee's hiring decision, and it does not appear that Plaintiff's primary motivation for speaking was to improve her own work environment. In fact, Plaintiff spoke out about the treatment of Dr. LeBlanc *despite* fears that such speech could harm her job. Furthermore, whether or not Defendants continued discriminating against applicants would appear to have had little effect on the employment status of Plaintiff, who already had a job. Because, in contrast to the circumstances in *Morgan* and *Maggio,* Plaintiff's complaints focused on the treatment of individuals other than herself, her speech did not take the "form of a private employee grievance." *Maggio,* 211 F .3d at 1353; *see also Morgan,* 6 F.3d 755.

Defendants Firestone, Nix, and Squires respond that gender discrimination was not the primary purpose of Plaintiff's speech. Rather, they contend, Plaintiff was primarily concerned that the committee had favored an internal candidate and failed to review Dr. LeBlanc's qualifications adequately. Were this true, Plaintiff's speech probably would not constitute speech on a matter of public concern, because the primary concern would be focused only on disagreements with the administration of legal hiring practices. *See Harris v. Victoria Indep. Sch. Dist.,* 168 F.3d 216, 220-21 (5th Cir. 1999) (recognizing that "a federal court is not the appropriate forum in which to seek redress over"

such issues of internal management and disagreement about the mere administrative aspects of the school); *Kurtz,* 855 F.2d at 730 (recognizing that disputes about internal management are not issues of public concern). However, the record provides strong support for the inference that Plaintiff spoke out because of her concern about gender discrimination in the decision to hire Dr. Kaufman. *See supra* Part II.B.2.a.i.

Additionally, the fact that Plaintiff did not address the public directly on these matters does not strip this speech of its status as speech on a matter or public concern. The Court recognizes that a claim of public concern sometimes "loses force" when the plaintiff has taken "no affirmative steps . . . to inform the public at large about . . . the problems with which he was so gravely concerned." *Kurtz,* 855 F.2d at 729. However, the mere fact that a plaintiff chooses to speak out in a private forum, rather than to make the issue public, does not necessarily strip the speech of its constitutional protections. *See Givhan v. W. Line Consol. Sch. Dist.,* 439 U.S. 410, 414 (1979); *Gonzalez v. Lee County Hous. Auth.,* 161 F.3d 1290, 1296 (11th Cir. 1998). Here, the fact that Plaintiff chose these fora as the most appropriate, or most effective, means of voicing her concerns does not outweigh the other evidence that the speech was not self-motivated and dealt with issues of social importance. Accordingly, the Court finds that Plaintiff spoke out on a matter of public concern.

c. *Pickering* Balance

The Court next weighs Plaintiff's interest in free speech against "the interest of the state, as an employer in promoting the efficiency of the public services it performs through its employees." *Pickering.* 391 U.S. at 568; see *also Rankin,* 483 U.S. at 388; *Ferrara v. Mills,* 781 F.2d 1508, 1513 n.6 (11th Cir. 1986) (noting the "distinction between speech to which no constitutional right attaches [and] speech that, while protected, is . . . outweighed by the government's interest" (internal quotation marks omitted). It is necessary to

balance these interests by focusing on (1) how disruptive the speech was; (2) the time, place and manner of the speech; and (3) the context of the speech. *See Rice-Lamar,* 232 F.3d at 841; *see also Pickering,* 391 U.S. at 570-73; *Maples v. Martin,* 858 F.2d 1546, 1554 (11th Cir. 1988). Viewing these factors as a whole, the Court finds that the *Pickering* balance weighs in favor of the Plaintiff.

Plaintiff's speech caused minimal disruption to the workplace. She voiced these concerns first by aiding in the production of the minority memorandum. This document was read to the other committee members and then sent to the administrative department heads. This document was not sent throughout the school as a means of disrupting the affairs of the department. Additionally, Plaintiff voiced her concerns primarily in two fora: (1) within the committee meetings in which the challenged decision was made and (2) to administrative officials in meetings scheduled to investigate these matters. Each of these places was an appropriate forum for voicing these concerns. Moreover, there is no evidence that Plaintiff caused great disruption in her efforts to gain support for Dr. LeBlanc; in fact, the record indicates that she contacted only one other faculty member, Ms. DelRey. Finally, Plaintiff did not make a public spectacle of the issue, but sought to challenge what she felt to be discriminatory conduct through the least disruptive means available. In light of these circumstances, the Defendant Board appears to have had little countervailing interest in limiting that speech. As previously noted, concerns about gender discrimination involve important social interests, and Plaintiff went about addressing this issue in a manner that had minimal disruptions on the workplace.

d. Substantially Motivating Factor

Once a plaintiff has prevailed on the balancing test, "the fact-finder determines whether the employee's speech played a 'substantial part' in the government's decision to

demote or discharge the employee." *Bryson,* 888 F.2d at 1565 (quoting *Mt. Healthy,* 429 U.S. at 285). As previously discussed, Plaintiff has created a genuine issue of material fact as to whether the 1996 refusal to grant early review of promotion and tenure was substantially motivated by her speech for the purposes of Defendant Board's liability under Title VII. For purposes of Plaintiff's § 1983 claim for First Amendment retaliation, the Court must further determine whether the conduct of Defendants Firestone, Nix, and Squires, individually, was substantially motivated by her speech. As to Defendant Squires, Plaintiff has provided almost no basis whatsoever for linking any discriminatory animus on his part to the 1996 denial of early consideration for promotion and tenure. In fact, the only conduct by him about which she complains took place during the third-year review - an event taking place after the denial of her early review request. Additionally, Plaintiff admits that Defendant Nix did not participate in the initial denial of her request and that he did not vote when Plaintiff's request for reconsideration of that decision was denied. Finally, Plaintiff cites no specific conduct by Defendant Firestone in relation to the denial of early review to support her claim that his actions were substantially motivated by her speech. However, even assuming, arguendo, that their conduct was substantially motivated by Plaintiff's protected speech, Defendants Firestone, Nix, and Squires have shown, by a preponderance of the evidence, that they would have made the same decision even in the absence of Plaintiff's protected speech.

e. Same Decision

Once a plaintiff creates a genuine issue of material fact as to whether her speech substantially motivated the adverse employment action, the defendant must be given the opportunity to demonstrate "by a preponderance of the evidence" that the same decision would have been reached "even in the absence of the protected conduct." *Mt. Healthy,* 429 U.S. at 287. Here, as discussed regarding pretext under

Title VII, *see supra* Part II.B.2.c., University policy at the time of Plaintiff's request required a minimum of five years experience before receiving promotion and tenure; however, Plaintiff had not yet finished her third year at the time of her request. Additionally, Defendants contend that there were legitimate concerns with the strength of Plaintiff's publications, and Plaintiff has not provided a basis for disbelieving this concern motivated the decision.

Defendants have proven by a preponderance of the evidence that despite any potential discriminatory animus, the same decision to deny early review for promotion and tenure would have been reached anyway. Yet Plaintiff has not "come forward with significant probative evidence demonstrating the existence of a triable issue of fact" contesting Defendants' showing. Defendants Firestone, Nix, and Squires have therefore shouldered their burden as to the fourth prong. *See Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1115 (11th Cir. 1993) (internal quotation marks omitted). In light of this finding, Plaintiff has failed to create a genuine issue of material fact as to whether she suffered from the violation of a currently cognizable right. Because Plaintiff has established no such violation of a currently cognizable constitutional right, Defendants Firestone, Nix, and Squires are entitled to qualified immunity. *See Hartley,* 193 F.3d at 1271. Accordingly the motions for summary judgment of Defendants Firestone, Nix, and Squires regarding Plaintiff's § 1983 claims for retaliation under the First Amendment are hereby GRANTED.

2. Equal Protection Claims Under the Fourteenth Amendment

While Plaintiff has labeled Count II of her First Amended Complaint as a claim for "sex discrimination in violation of the Plaintiff's Fourteenth Amendment Right to Equal Protection," the numbered paragraphs of the count actually allege two claims: equal protection violations based

on both disparate treatment and retaliation. The Court will therefore examine each of these claims in turn.

a. Retaliation

The Eleventh Circuit has expressly held that "while the right to be free from retaliation is clearly established as a *first amendment* right and as a *statutory* right under Title VII . . . no clearly established right exists under the *equal protection* clause to be free from retaliation." *Ratcliff v. Dekalb County,* 62 F.3d 338, 340 (11th Cir. 1995). Therefore, the only remedies available to Plaintiff would come under Title VII and the First Amendment. Because Plaintiff has not shown a violation of a currently cognizable constitutional right, Defendants Firestone, Nix, and Squires are entitled to qualified immunity for Plaintiff's § 1983 claims for retaliation under the equal protection clause, and their motions for summary judgment regarding these claims are hereby GRANTED. *See Hartley,* 193 F.3d at 1271.

b. Disparate Treatment

Because § 1983 equal protection claims generally "have the same requirements of proof and use the same analytical framework" as Title VII disparate treatment claims, the Court can "address the Title VII claim with the understanding that the analysis applies to the § 1983 claim as well." *Standard v. A.B.E.L. Servs., Inc.,* 161 F.3d 1318, 1330 (11th Cir. 1998); *see also Alexander v. Fulton County,* 207 F.3d 1303, 1314 n.6 (11th Cir. 2000); *Cross v. Alabama State Dep't of Mental Health & Retardation,* 49 F.3d 1490, 1507-08 (11th Cir. 1995) (noting that "when § 1983 is used as a parallel remedy for violation of Title VII, the elements of the two causes of action are the same"). The Court has already determined that Plaintiff has failed to make out a prima facie case of disparate treatment based on gender because she cannot demonstrate that she was treated differently than a similarly situated male. *See supra* Part II.B.3.a.ii. As such, Plaintiff cannot demonstrate that she has suffered from the deprivation of a currently cognizable constitutional right.

Accordingly, having found no violation of a currently cognizable constitutional right, Defendants Firestone, Nix, and Squires are entitled to qualified immunity for Plaintiff's § 1983 equal protection claims of discrimination under the Fourteenth Amendment, and their motions for summary judgment regarding these claims are GRANTED. *See Hartley,* 193 F.3d at 1271.

III. CONCLUSION

Accordingly, the Court finds that Defendants' motions for summary judgment are hereby GRANTED.

The Court notes that Defendants Firestone, Nix, and Squires have not discussed in their motions Plaintiff's § 1983 claim for deprivation of a liberty interest without due process as alleged in Count V of her First Amended Complaint or to Plaintiff's § 1983 claim for equal protection violations based on disability as alleged in Count III of the First Amended Complaint. Therefore, these two claims still remain before the Court. However, because of the complicated procedural history of this case, the Court hereby allows Defendants Firestone, Nix, and Squires additional time to file a motion for summary judgment limited to these two remaining claims. Accordingly, Defendants Firestone, Nix, and Squires shall have until April 1, 2002, to file a motion for summary judgment concerning these two claims. Should they do so, Plaintiff shall have twenty days from the filing of that motion to file a response, and Defendants shall have ten days from the filing of the response to file a reply.

SO ORDERED, this 12th day of March, 2002.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action No. 3:97-CV-95 (DF)

CAROL STAVROPOULOS,
PLAINTIFF,
V.
EVAN FIRESTONE, W. ROBERT NIX, WILLIAM SQUIRES AND BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
DEFENDANT.

ORDER

On March 13, 2002, the Court entered an order granting several motions for summary judgment. Additionally, the order expressly provided Defendants Firestone, Nix and Squares ("Defendants") the opportunity to file a supplemental motion addressing two remaining Fourteenth Amendment claims raised in Plaintiff's amended complaint. Pursuant to that provision, Defendants Firestone, Nix and Squires have filed a Supplemental Motion for Summary Judgment [tab # 160] asserting that they are entitled to qualified immunity for Plaintiff's claims of violations of her due process and equal protection rights under the Fourteenth Amendment.

Plaintiff responds by conceding that in light of the Court's March 13, 2002 order, her equal protection claim must be dismissed. Therefore, the only question still remaining before the Court is whether Defendants Firestone, Nix and Squires are entitled to qualified immunity from any liability stemming from Plaintiff's claim that she was deprived of a liberty interest in violation of her Fourteenth Amendment due process rights.

I. FACTUAL BACKGROUND

Plaintiff obtained employment with the University of Georgia in 1993 as a professor in the education department of the School of Art. At all times relevant to this action, Defendant Firestone was the Director of the School of Art and Defendant Nix was the Chairman of the Art Education program.

During the fall semester of 1994, Defendant Firestone selected Plaintiff and five others to serve on a search committee that was charged with finding a suitable candidate for the computer artist position. The committee selected Dr. Kaufman, a male candidate. Disagreeing with this decision, Plaintiff and another colleague, Dr. Tindall, voiced concerns that Dr. LeBlanc, a female candidate, was better-qualified and had not been given fair treatment due to her gender. Plaintiff again voiced these concerns at a full meeting of the Art Department and subsequently filed a minority report with Dr. Anderson, Dean of the School of Art, discussing these concerns about the lack of gender diversity in the computer field.

In the spring of 1995, the majority of tenured faculty of the School of Art voted not to renew Plaintiff's employment contract for the 1996-1997 academic year. Upon learning of the non-renewal vote, Plaintiff complained to the Dean's office. In response to this complaint, Dr. Morrow, Associate Dean of the School of Art, asked Defendant Firestone to develop a "separate personnel file" explaining the basis of this vote. To create this file, Defendant Firestone requested letters and evaluations from other faculty members concerning Plaintiff's behavior and job performance, including a memorandum from Defendant Nix. Upon reviewing both this file and the record of the committee's non-renewal decision, Dr. Morrow and Dr. Anderson decided not to support the non-renewal vote because it was too difficult to reconcile with Plaintiff's excellent performance evaluations.

In November 1995, Defendant Squires wrote Defendant Firestone a letter concerning Plaintiff's absence from a meeting where one of her students presented class-related work.

During the 1995-1996 academic year, Plaintiff made a request to be considered for early tenure and promotion. However, in February 1996, the tenured faculty voted to deny this request. The next month, Plaintiff requested a special review committee on the matter, but the tenured faculty voted against the appointment of a such a committee. In support of this decision, Defendants noted (1) that Plaintiff lacked a strong record of publications, and (2) the University's policy that all faculty must undergo a five-year probationary period before receiving promotion or tenure. At the time of Plaintiff's early request, she was still in her third year as a professor at the University—still within the minimum probationary period.

Toward the end of that same year, Plaintiff underwent her third-year review, a process used by the faculty to assess a professor's progress toward attaining tenure. It was determined that Defendant Firestone's separate personnel file would not be used in conjunction with the review. At the initial committee meeting, Defendant Firestone submitted a fact memorandum discussing events concerning Plaintiff's allegations of discrimination in the computer artist search. Defendant Firestone also allegedly solicited faculty members to speak to the committee about negative experiences with Plaintiff. Defendant Nix spoke about concerns of Plaintiff's health, and Defendant Squires prepared a memorandum discussing concerns that Plaintiff suffered from a mental illness. During the committee meeting, Plaintiff was also given the opportunity to answer questions and respond to any concerns felt by the committee. At that time, some members asked Plaintiff questions about her mental health, medical leave, and related medications that she may have taken.

On May 27, 1996, the third-year review committee presented its report to the tenured faculty who were meeting to vote on the renewal of Plaintiff's 1997-1998 employment contract. This report included memoranda submitted faculty members such as Defendant Nix and Defendant Squires. Plaintiff's written response to the committee's recommendation was also presented to the faculty. At the conclusion of these proceedings, the tenured faculty voted not to renew Plaintiff's contract for 1997-1998. On June 13, 1996, Defendant Firestone informed Plaintiff of the non-renewal vote.

Plaintiff then filed a grievance with the College of Arts & Sciences Faculty Senate Grievance Panel, which had a hearing beginning on June 9, 1997. Plaintiff was represented by an attorney at these proceedings. On June 23, 1997, the Panel issued a report stating its opinion that the decision not to renew Plaintiff's contract had resulted (1) from discrimination against her on the basis of a perceived disability and gender, and (2) in retaliation for her conduct regarding the 1995 computer artist position selection. Based on these concerns, and after examining the separate personnel file, the Panel recommended that Plaintiff retain her position. Pursuant to this recommendation, Plaintiff retained her position as professor for the 1997-1998 academic year and received no loss of pay or benefits.

II. DISCUSSION

A. Standard of Review

Summary judgment must be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact necessary to defeat a properly supported motion for summary judgment arises only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing a motion

for summary judgment, the court must review all the evidence in the record while "draw[ing] all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see also Maynard v. Williams*, 72 F.3d 848, 851 (11th 1996).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact" and that entitle it to a judgment as a matter of law. *Celotex Corp.*, 477 U.S. at 323 (internal quotation marks omitted). If the moving party discharges this burden, the burden then shifts to the nonmoving party to go beyond the pleadings and present specific evidence showing that there is a genuine issue of material fact (i.e., evidence that would support a jury verdict) or that the moving party is not entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(e); see also *Celotex Corp.*, 477 U.S. at 324-26. This evidence must consist of more than mere conclusory allegations or legal conclusions. See *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). Under this scheme, summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

B. Section 1983 Claims for Procedural Due Process Violations

Plaintiff contends that Defendants made false statements about her mental health and professional ability during the course of her 1995 and third-year reviews, and that these statements were made a part of her permanent record in violation of her Fourteenth Amendment procedural due process rights. In response Defendants have asserted the

affirmative defense of qualified immunity. "Qualified immunity protects government officials performing discretionary functions from civil trials . . . and from liability if their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known." *Lassiter v. Alabama A & M Univ.*, 28 F.3d 1146, 1149 (CA11 1994) (en banc) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982)). To overcome the defense of qualified immunity, a plaintiff must prove that (1) she has suffered from the deprivation of a currently cognizable constitutional right, and (2) the right was clearly established at the time of the conduct such that a reasonable person would have been put on notice of the constitutional violation. *See Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *Chesser v. Sparks*, 248 F.3d 1117, 1122 (11th Cir. 2001). Therefore, Defendants are entitled to qualified immunity unless Plaintiff shows that they violated her due process rights and that these rights were clearly established at the time of the violation.

Looking first to whether Defendant did in fact violate Plaintiff's due process rights, it is clear that:

> [in order to establish that a deprivation of a public employee's liberty interest has occurred without due process of law, the employee must prove that: (1) a false statement (2) of a stigmatizing nature (3) attending a governmental employee's discharge (4) was made public (5) by the governmental employer (6) without a meaningful opportunity for employee name clearing.

Cannon v. City of W. Palm Beach, 250 F.3d 1299, 1301 (11th Cir. 2001); see also *Buxton v. City of Plant City*, 871 F.2d 1037, 1042-43 (CA11 1989). Even assuming that there are genuine issue of material fact as to whether any of the statements at issue were false, stigmatizing and made public. Plaintiff has nevertheless failed to demonstrate (1) that these

comments were accompanied by a discharge, or (2) that she did not receive an adequate name-clearing opportunity.

Defamation on the part of the State, without the additional deprivation of some tangible interest does not constitute a deprivation of procedural due process in violation of the Fourteenth Amendment; rather a plaintiff must first demonstrate that these statements were accompanied by the "alteration of legal status." *Cannon*, 250 F.3d at 1302 (internal quotation marks omitted) (discussing basis and nature of the requirement of showing "stigma-plus" under § 1983); *see also Paul v. Davis*, 424 U.S. 693, 694 (1976). Moreover, "in this circuit a 'discharge or more' is required in order to satisfy the 'plus' element of the stigma-plus test. A transfer or a missed promotion is not enough." *Cannon*, 250 F.3d at 1302 (quoting *Oladiende v. City of Birmingham*, 963 F.2d 1481, 1486 (11th Cir. 1992) (en banc)). Because Plaintiff has failed to demonstrate any such adverse action that accompanied the statements at issue, she has not satisfied the stigma-plus showing necessary to sustain her claim under the Fourteenth Amendment.

Quite simply, Plaintiff's complaint makes no allegation that she was discharged as a result of these statements.[1] In fact, Plaintiff has failed to demonstrate how either the 1995 recommendation or the third-year review resulted in any material change in her employment. Plaintiff contends that "false and negative material was submitted to

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[1] Subsequent to the original filing of this action, but prior to Plaintiff's amended complaint, Plaintiff was due to be considered for promotion and tenure by the 1997-1998 review committee, at which time she was denied tenure and promotion. However, the complaint makes no mention whatsoever of the 1997-1998 decision. Moreover, the fact that this decision is the basis of subsequent suit against Defendants provides strong evidence that Plaintiff did not intend to file redundant claims. Accordingly, the matter currently before the Court does not involve claims for the 1997-1998 denial of tenure and promotion.

[her] third-year review committee," at which time the committee voted not to renew her employment. However, it is clear that the subsequent grievance panel reversed the faculty decision not to renew Plantiff's contract, and as a result of this decision, Plaintiff retained her position with no loss of pay or benefits. Plaintiff has also failed to demonstrate any alteration of her legal status as a result of any comments made during the 1995 committee non-renewal recommendation—it was immediately rejected and never allowed to affect Plaintiff's employment status. Accordingly, neither the 1995 non-renewal recommendation nor the third-year senior-faculty recommendation were allowed to result in a tangible alteration of Plaintiff's legal rights as neither cause Plaintiff to suffer any reduction in pay or position. See *Oladiende*, 963 F.2d at 1486 (explaining that where "no loss of income or rank occurred, and absent a discharge or more, injury to reputation itself is not a protected liberty interest").

In addition to failing to demonstrate that a defamatory statement resulted in discharge, Plaintiff has not shown that she was denied a meaningful opportunity to clear her name. As the Eleventh Circuit has expressly recognized, it is only "when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under 1331 arise . . . ." *Cotton v. Jackson*, 216 F.3d 1328, 1330-31 (2000) (per curiam) (quoting *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994)). Therefore, even assuming that some due process right has been violated, "[i]f adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived him of procedural due process." *Cotton*, 216 F.3d at 1331.

Here, Plaintiff was afforded ample opportunity to clear her name of any defamatory statements that may have originated as a result of her employment reviews. In fact, Plaintiff had two such opportunities. First, during the initial committee meeting of her third-year review, Plaintiff was allowed to be present, at which time she could respond to any

concerns and contest any inaccuracies that were made a part of her recommendation report. In addition to this personal appearance, she was allowed to supplement the committee's report with written objections to recommendations being presented to the senior faculty. Second, in response to the senior faculty's ultimate recommendation, Plaintiff was able to appeal the decision to a separate grievance panel and personally contest any inaccuracies upon which the senior faculty decision was based. During that hearing, Plaintiff, accompanied by an attorney was provided with the opportunity during this hearing to challenge openly attacks on her professional abilities or mental health. It is also clear that the panel considered her concerns regarding that separate personnel file, an issue that it discussed in its recommendation to reject the non-renewal vote. In light of these procedures, the Court finds that Plaintiff did receive a meaningful name-clearing opportunity.

III. CONCLUSION

Plaintiff has failed to satisfy the stigma-plus element of a Fourteenth Amendment due process claim, and she has not demonstrated that she was denied any meaningful opportunity to clear her name and correct her employment record. In light of these findings, Plaintiff cannot demonstrate that she has suffered from the deprivation of a currently cognizable constitutional right, and Defendants Firestone, Nix and Squires are entitled to qualified immunity for Plaintiff's § 1983 due process claims under the Fourteenth Amendment. *See Hartley v. Parnell*, 193 F. 3d 1263, 1271 (11th Cir. 1999). Accordingly, Defendants' supplemental motion for summary judgment is hereby GRANTED.

SO ORDERED, this 19th day of November, 2002.

/s/ Duross Fitzpatrick
DUROSS FITZPATRICK
UNITED STATES
DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

Civil Action No. 3:97-CV-95 (DF)

November 21, 2002

CAROL STAVROPOULOS,
PLAINTIFF,
V.
EVAN FIRESTONE, W. ROBERT NIX, WILLIAM SQUIRES AND BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
DEFENDANTS

JUDGMENT

The Court by Orders filed March 13, 2002 and November 20, 2002, having granted Defendant's Motions for Summary Judgment,

JUDGMENT is hereby entered in favor of Defendants. Plaintiff shall recover nothing from defendants. Defendants are also entitled to recover their costs of this action.

This November 21, 2002.

GREGORY J. LEONARD, CLERK

/s/ Zadie Peters
ZADIE PETERS
DEPUTY CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-16486-II

FILED October 14, 2004

CAROL STAVROPOULOS,
PLAINTIFF-APPELLANT,

v.

EVAN FIRESTONE, W. ROBERT NIX, WILLIAM SQUIRES, INDIVIDUALLY, AND IN HIS OFFICIAL CAPACITY AS DIVISION HEAD OF THE ART EDUCATION DEPARTMENT OF THE SCHOOL OF ART, BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
DEFENDANTS-APPELLEES.

On Appeal from the United States District Court for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19_____, _____ F.2d _____).

Before: EDMONDSON, Chief Judge, DUBINA and COX, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal

Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. R. Cox
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-8723

D.C. Docket No. 3:97-CV-95

April 2, 1999

CAROL STAVROPOULOS,
PLAINTIFF-APPELLANT,
v.
EVAN FIRESTONE, W. ROBERT NIX, ET AL, DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Middle District of Georgia
(April 2, 1999)

Before ANDERSON and BLACK, Circuit Judges, and FORRESTER,* District Judge.

PER CURIAM:

Plaintiff alleges that that the individual defendants retaliated against her on account of two instances of protected speech. The individual defendants filed a motion to dismiss, Fed. R. Civ. P. 12(b)(6), based on qualified immunity. This is

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* Honorable Owen J. Forrester, U.S. District Judge for the Northern District of Georgia, sitting by designation.

an appeal from the district court's non-final order denying the motion to dismiss.[1]

On appeal, Appellants challenge only the district court's conclusion that Plaintiff's allegations (with respect to the two instances of speech set forth in her complaint) embodied speech implicating a public concern under clearly established law.[2] With respect to the first instance of speech that Plaintiff contends is protected, the complaint and its attachments make clear that Plaintiff has alleged that she criticized the selection process for the hiring of a new teacher on the ground that there was gender discrimination in the process, and that she voiced these criticisms to the hiring committee itself, to the Director of Women's Studies, and to the Dean of the College of Arts and Sciences. Plaintiff's criticism centered on the hiring process involving an applicant other than herself, and the complaint does not otherwise suggest that the context of plaintiff's criticism involved any type of personal grievance. Given these allegations, the district court did not err in concluding that Plaintiff's allegations with respect to this speech implicated matters of public concern pursuant to clearly established law. *See Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1988).

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[1] Such an order denying qualified immunity is immediately appealable. *See Mitchell v. Forsyth*, 472 U.S. 511, 527-529, 105 S.Ct. 2806, 2816-2817 (1985).

[2] Appellants make no argument under *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), that even if Plaintiff's speech was protected by the First Amendment, her interest in voicing such speech was outweighed by their interest in promoting workplace efficiency, thereby rendering the alleged retaliation not a violation of her clearly established right; accordingly, we decline to address that issue in this appeal. Also, appellants make no argument on appeal that we should view the complaint as pursuant to a heightened pleading standard; thus we evaluate the complaint pursuant to the usual standard of Fed. R. Civ. P. 8(a).

However, we conclude otherwise with respect to the second instance of speech alleged by Plaintiff. In Paragraph 17 of the complaint, Plaintiff alleges merely that Defendant Nix made false statements in retaliation for Plaintiff's sympathy and support for students who raised concerns about sexual harassment by Defendant Nix. Neither in Paragraph 17 nor elsewhere in the complaint or its attachments does Plaintiff allege any facts which would indicate the content of such speech, or its form or context – rendering a public concern analysis under *Connick v. Meyers*, 103 S.Ct. 1684, 1690 (1983), impossible to conduct. Without such allegations as to content, form, and context of this aspect of Plaintiff's speech, we cannot conclude that it constituted expression touching on a topic of concern as a matter of clearly established law.

Therefore, we affirm the district court's denial of the motion to dismiss with respect to the first instance of speech; however, with respect to the second instance, we reverse the district court's denial of the motion to dismiss. On remand, the district court in its discretion may permit plaintiff to amend under Fed. R. Civ. P. 15.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION
No. 3:97-GV-95(DF)

CAROL STAVROPOULOS,
PLAINTIFF,

V.

EVAN FIRESTONE, W. ROBERT NIX,
WILLIAM SQUIRES, AND THE BOARD
OF REGENTS OF THE UNIVERSITY
SYSTEM OF GEORGIA,
DEFENDANTS.

Opinion Filed May 12, 1998
Before Duross Fitzpatrick, District Judge

ORDER

The above styled case is a civil rights action in which the plaintiff, Carol Stavropoulos, claims that she was discriminated against on the basis of her sex and a perceived disability, and retaliated against because she had engaged in constitutionally protected speech. Plaintiff also alleges various state law claims. Now before the Court is a motion to dismiss on behalf of Defendants Evan Firestone, W. Robert Nix, and William Squires. For the reasons stated herein, Defendants' motion is granted in part and denied in part.

In deciding this motion to dismiss, the Court must follow the well established rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Parr v.*

Woodmen of the World Life Ins. Co., 791 F.2d 888, 889-90 (11th Cir. 1986) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1686-87, 40 L.Ed.2d 90 (1974) (citations omitted)). In assessing Defendants' motion, the Court must accept all allegations in the complaint as true. *Powell v. M.C. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990).

At all times relevant to this action, Plaintiff was employed by the Board of Regents of the University System of Georgia as an assistant professor of art education. In 1995, Defendant Evan Firestone, Director of the University of Georgia School of Art, requested that Plaintiff serve on a faculty search committee to select a candidate for a computer artist position. During the course of service on this committee, Plaintiff voiced opposition to the process employed by the committee in selecting the candidate who was ultimately appointed to the position. Plaintiff's criticism of the process centered on the failure of the committee to fairly consider a better qualified female candidate and failure to adhere to University of Georgia guidelines ensuring equal opportunity of employment.

After Plaintiff's service on the faculty search committee was completed, Plaintiff was denied recommendation for reappointment by the faculty for the 1996-97 school year. The Dean of the Franklin College of Arts and Sciences subsequently reversed Plaintiff's non-renewal. Thereafter, Defendant Firestone solicited negative information about Plaintiff, compiled an unauthorized personnel file and engaged in "other acts of retaliation against plaintiff."

In 1996, Defendant Firestone appointed a faculty committee to conduct a third year review of Plaintiffs record of teaching, research, and service. Defendant Firestone instructed the third year review committee to consider the adverse material Firestone had previously compiled in retaliation for Plaintiff's service on the computer artist search committee.

On May 22, 1996, Defendant Squires, as chairman of the third-year review committee, wrote a memorandum to the committee entitled, "Understanding the Role Played by Illness Relative to Carol Stavropoulos'[s] Performance of Her Duties as a Faculty Member." The memorandum contained references to pamphlets from the National Depressive and Manic Depressive Association. That memorandum suggested to the tenured faculty that they consider Plaintiffs appointment in light of Defendant Squires's perception that Plaintiff suffered from a "major mental disorder."

During faculty meetings, which were held in order to consider Plaintiff's application for early tenure and to consider renewal of Plaintiff's contract, Defendants Squires, Firestone, and Nix caused significant procedural irregularities which resulted in denial of Plaintiff's application for early tenure and a negative vote on renewal of Plaintiff's contract. On June 18, 1996, Plaintiff received a letter from Defendant Firestone notifying her of the non-renewal of her contract for the 1997-98 academic year.

Plaintiff also alleges in her complaint that Defendant Firestone depressed Plaintiff's pay raises and took "other actions adverse to plaintiff's employment in retaliation for plaintiff's exercise of her protected rights" and that "Defendants treated plaintiff less favorably than similarly situated male assistant professors on the basis of sex and perceived disability."

Plaintiff further contends that Defendant Nix made false and malicious reports concerning Plaintiff's job performance and his approval of Plaintiff holding a graduate seminar at her home (Defendant Nix expressly approved of Plaintiff's home as a meeting place and then falsely and maliciously denied having given his approval). Defendant Nix made these false statements in retaliation for Plaintiff's sympathy and support for students who raised concerns about sexual harassment by Defendant Nix. Plaintiff's actions in counseling students with complaints of sexual harassment were required by University

of Georgia policies. Defendant Nix also filed a malicious and baseless civil action in the Superior Court of Clarke County in retaliation for Plaintiff's protected actions.

I. § 1983 CLAIMS

In Count One of her complaint, Plaintiff alleges that "Defendants have violated plaintiff['s] constitutional rights to freedom of speech, due process of law, and equal protection of law."

A. First Amendment Retaliation

A government employer may not take adverse employment action against a public employee in retaliation for engaging in constitutionally protected speech. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). To be protected under the First Amendment, a public employee's speech must implicate matters of public concern. That is, the speech must relate to a matter of political, social, or other concern to the community. *Connick v. Meyers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). In making this determination, the court looks at the content, form, and context of the given statement. *Id.* First Amendment protection does not attach to speech that exposes, merely for personal benefit, a personal grievance. *Id.*; *Morgan v. Ford*, 6 F.3d 750, at 754-55 (11th Cir. 1993).

In her complaint, Plaintiff asserts two instances in which she engaged in protected speech: (1) Plaintiff "voiced opposition . . . [to] the failure of the [search] committee to fairly consider a better qualified female candidate and failure to adhere to University of Georgia guidelines ensuring equal opportunity of employment," and (2) Plaintiff's "sympathy and support for students who raised concerns about sexual harassment by Defendant Nix." *Plaintiff's Complaint*, ¶ 17. Defendants argue that these expressions involved personal grievances and complaints of internal, departmental conduct, which do not involve political, social, or other concern to the community.

1. Opposition to Alleged Discrimination

In a broad sense, Plaintiff's criticism of the faculty search committee's failure to adhere to University of Georgia equal employment opportunity guidelines and failure to consider a better qualified female candidate involved allegations of discrimination on the part of the faculty hiring committee of a public university. Speech aimed at identifying or eradicating official misconduct in a public institution has been held to qualify as speech involving a matter of public concern. *See, e.g., Davis v. Ector County*, 40 F.3d 777, 783 (5th Cir. 1994) ("reports of sexual harassment perpetrated on public employees is of serious public concern" since this information is "relevant to the public's evaluation of the performance of governmental agencies"); *Wilson v. UT Health Center*, 973 F.2d 1263, 1269 (5th Cir. 1992) (reports of sexual harassment perpetrated on the plaintiff and other women at the health center is of great public concern); *Marshall v. Allen*, 984 F.2d 787, 795 (7th Cir. 1993) (sex discrimination in a public agency is a topic of public concern); *Cooper v. Smith*, 855 F. Supp. 1276, 1280 (S.D. Ga. 1994) (deputy sheriff's conversations with state bureau of investigation concerning the alleged misconduct of an elected official were related to matters of public concern), *Clark v. City of Macon*, 860 F. Supp. 1545, 1553 (M.D. Ga. 1994) (city employee's speech concerning misuse and theft of city property was matter of public concern); *Moore v. Tri-City Hospital Authority*, 696 F. Supp. 1496, 1496 (N.D. Ga. 1988) (hospital chaplain's speech concerning religious and spiritual commitment of public hospital, availability of a chapel in the hospital, and convenience of the chaplain's office to the public who use the hospital was matter of public concern).

In a narrow sense, Plaintiff's speech involved an internal grievance about a departmental matter. Speech aimed at expressing a personal grievance, for personal benefit, is not protected. *See, e.g., Watkins v. Bowden*, 105 F.3d 1344 (11th Cir. 1997) (public employee's private and informal complaints about her colleagues' treatment of her was not

matter of public concern, in part because it did not "draw the public at large or its concerns into to picture" and such was made in her capacity as employee rather than as citizen); *Holbrook v. City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997) (employee's complaints about employer's discrimination on the basis of disability was not matter of public concern, because "it did not refer to any practice or course of conduct by the police department against disabled individuals beyond [the plaintiff] and [did] not seek redress beyond improving [the plaintiffs] personal employment situation"). In contrast to these cases, however, here, Plaintiff's speech involved allegations of discrimination against another individual, not against herself (Plaintiff was not claiming that *she* had been discriminated against). Thus, her speech "did not constitute an employee grievance motivated merely 'by her . . . rational self-interest in improving the conditions of her employment.'" *Tindal v. Montgomery County Comm'n*, 32 F.3d 1535, 1539 (11th Cir. 1994) (*quoting Morgan v. Ford*, 6 F.3d 750, 754-55 (11th Cir. 1993)). As such, it does not involve purely a personal grievance, the sort of speech which *Connick* sought to exclude from constitutional protection. 461 U.S. at 147-48; 103 S.Ct. at 1690-91.

Even though Plaintiff's speech did not directly impact the public, the Court finds that because it involved allegations of discriminatory practices by faculty members of a public university, it relates to a matter of concern to the public and is, therefore, constitutionally protected. *See Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1998) (plaintiff's speech involving inadequate facilities, low faculty to student ratio, poor performance of graduates on licensing exam, ability of department to prepare students for professional careers, and status of accreditation "directly affected the public's perception of the quality of education in a given academic system," and thus involved a matter of public concern).

2. Sympathy and Support for Alleged Victims of Sexual Harassment

Likewise, Plaintiff's voicing sympathy and support for students who complained of sexual harassment by a faculty member does not involve a personal grievance, but rather, implicates system-wide discrimination. Thus, the Court finds that it involves a matter of public concern. *See Muller v. Fairfax County Sch. Bd.*, 878 F .2d 1578, 1582-83 (4th Cir. 1989) (public school teacher's letter in response to student's allegations of sexual discrimination in physical education classes was a matter of public concern); *Marshall v. Allen*, 984 F.2d 787, 795 (7th Cir. 1993) (permitting § 1983 claim when employee was discharged for supporting employees who had filed gender discrimination suit against employer).

3. Qualified Immunity

In addition to showing that her speech involved a matter of public concern, a critical element of Plaintiff's First Amendment retaliation claim is that such speech played a substantial part in Defendants' challenged employment decisions. *See Bryson v. City of Waycross*, 888 F.2d 1562, 1565-66 (11th Cir. 1989) (establishing four part test for First Amendment retaliation claims). If Plaintiff fails to establish this element, she will have failed to show any violation of her rights. Consequently, Defendants will be entitled to qualified immunity if "their conduct violates no 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lassiter v. Alabama A&M Univ. Bd. of Trustees*, 28 F.3d 1146, 1149 (11th Cir. 1994).

Generally, there is no subjective component to qualified immunity analysis, and the test is based on objective reasonableness. *Id.* at 1150. However, where, as here, "subjective motive or intent is a critical element of the alleged constitutional violation[,] the intent of the government actor is relevant." *Walker v. Schwalbe*, 112 F .3d 1127, 1132-33 (11th Cir. 1997) ("government official's state of mind is critical element of First Amendment retaliation claims"). Therefore,

because Plaintiff's proof of Defendants' motivation in taking the challenged action against her is necessary to determine whether Plaintiff's constitutional rights were violated, the issue of whether Defendants are entitled to qualified immunity is not appropriate for determination on a motion to dismiss. Accordingly, Defendants' motion to dismiss on qualified immunity grounds is DENIED at this time, but the issue may be raised again on a motion for summary judgment.

B. Due Process

In her complaint, Plaintiff alleges that she was deprived of a property interest in her employment with the University and a liberty interest in her reputation, without due process of law.[1]

1. Property

To be accorded procedural due process protection for an alleged deprivation of property without due process, Plaintiff must first show that she has a property interest in her job. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Then, Plaintiff must show that she suffered a deprivation of her rights. Defendants argue that since Plaintiff was not a tenured professor, she does not have a constitutionally protected property interest in her employment. Plaintiff asserts that even though she was not a tenured professor, she had an employment contract with the University, which gave rise to her expectation of continued employment.

In *Perry v. Sinderman*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972), the Supreme Court recognized that, despite the lack of tenure or a formal contract, a teacher

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[1] In the Eleventh Circuit, only procedural due process claims are available to public employees who claim that adverse employment action was taken against them arbitrarily and capriciously. *McKinney v. Pate*, 20 F.3d 1550,1560 (11th Cir. 1994). Thus, to the extent that Plaintiff's complaint alleges a substantive due process claim, such claim is hereby DISMISSED.

may have a property interest in continued employment, arising from an implied contract based on rules and understanding with the employer or from the circumstances and facts of the service. Plaintiff, therefore, has sufficiently alleged a property interest in her employment to overcome Defendants' motion to dismiss on this ground.

Plaintiff has failed, however, to allege with particularity that she was denied such property right without being accorded due process, as is necessary under the Eleventh Circuit's heightened pleading requirement for civil rights actions. *See GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.2d 1359, 1367 (11th Cir. 1998). Plaintiff fails to allege in her complaint that she did not receive the process to which she was entitled. "[A] procedural due process violation is not complete 'unless and until the State fails to provide due process.' . . , [T]he state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." *McKinney v. Pate*, 20 F.3d 1550, 1557 (11th Cir. 1994) (*quoting Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990)). Plaintiff does not allege with particularity any process to which she was due, which Defendants refused to provide. Therefore, although Plaintiff may have sufficiently alleged that she has a property right in her employment, she fails to state a claim for deprivation of that property right. Accordingly, Defendants' motion to dismiss this claim against them is GRANTED.

2. Liberty

To show that she was deprived of a liberty interest in reputation, Plaintiff must show that (1) a false allegation was made, (2) to the public, (3) about a public employee, (4) by a governmental employer, (5) that was stigmatizing, and (6) made without an opportunity for the employee to clear her name. *Buxton v. City of Plant City*, 871 F .2d 1037, 1042-43

(11th Cir. 1989); *Smith v. Upson County*, 859 F. Supp. 1504, 1513-14 (M.D. Ga. 1994), *aff'd*, 56 F.3d 1392 (11th Cir. 1995). Plaintiff alleges in paragraphs ten and eleven of her complaint that Defendants deprived her of her liberty interest in her reputation by "assembl[ing] an unauthorized personnel file" containing "negative information about the plaintiff" and then "instruct[ing] the third year review committee to consider the adverse material." Even though Plaintiff makes no allegation in her complaint that information about her was disseminated to the public by Defendants, placement of false allegations in one's personnel file may constitute sufficient publication for purposes of claimed liberty interest. *See Buxton*, 871 F.2d at 1045. However, Plaintiff makes no allegation that the information contained in the personnel file assembled by Defendants was false, as is required under *Buxton*. *Id.* at 1042-43. Furthermore, as discussed above, Plaintiff fails to allege that Defendants refused to provide her any process to which she was entitled. Accordingly, she fails to establish a claim of deprivation of a liberty interest without due process, and Defendants' motion to dismiss this claim against them is GRANTED.

C. Equal Protection

To establish an equal protection claim, a plaintiff must show that the defendant purposefully treated the plaintiff differently from other similarly situated individuals. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); *E&T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987).

Here, under the Eleventh Circuit's heightened pleading requirement, Plaintiff must allege particular facts establishing a claim of unequal treatment and discriminatory motive by Defendants. *GJR Investments*, 132 F.2d at 1367. In paragraph fifteen of her complaint, Plaintiff merely alleges that "Defendants treated [her] less favorably than similarly situated assistant male professors on the basis of sex and perceived disability.'" Plaintiff does not present a single

example of a male or non-disabled professor who was similarly situated who was treated differently than Plaintiff. "Bare allegations that 'other' [individuals], even 'all other' [individuals], were treated differently do not state an equal protection claim; a complaint must attempt to show in some fashion that these 'other' [individuals] were situated similarly to the plaintiff." *Id.* Plaintiff's factual allegations, therefore, are not sufficiently specific and particular to satisfy this Circuit's high standard. Accordingly, Defendant's motion to dismiss this claim is GRANTED.[2]

II. TITLE VII, TITLE IX and ADA

Plaintiff has brought claims under Title VII, Title IX, and the ADA against Firestone, Squires, and Nix, as well as the Board of Regents, in Counts Two, Three, and Four of her complaint, respectively.

Defendants Firestone, Squires, and Nix argue that, as individuals, they cannot be sued under these statutes. Defendants are correct in asserting that "[i]ndividual capacity suits under Title VII are . . . inappropriate. The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act." *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); *see also Cross v. State of Alabama*, 49 F .3d 1490, 1504 (11th Cir. 1995) (individual capacity suits cannot be brought under Title VII). Likewise, neither the ADA nor Title IX provide for individual employee liability. *See Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir. 1996) (the ADA "does not provide for individual liability, only employer liability."); *Does v. Covington Co. Sch. Bd. Of Ed.*, 930 F. Supp. 554, 566 (M.D. Ala. 1996) (Title IX actions may be brought against educational institution only, not an

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[2] To the extent that Plaintiff asserts an equal protection claim for retaliation, no such right exists under the equal protection clause. *Ratliff v. Dekalb County*, 62 F.3d 338, 340 (11th Cir. 1995).

individual). Thus, to the extent that Plaintiff is suing Defendants Firestone, Squires, and Nix under Title VII, Title IX, and the ADA in their unofficial capacities. Plaintiff's claims are hereby DISMISSED.

Plaintiff is also purportedly suing Defendants Firestone, Squires, and Nix under Title VII, Title IX, and the ADA in their official capacities, as well as the Board of Regents. In *Busby*, the Eleventh Circuit stated, "We think the proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly." 931 F.2d at 772. While Plaintiff's claims against Firestone, Squires, Nix in addition to the Board of Regents may be redundant, the Court does not find that the inclusion of the individual defendants in their official capacities is improper or that it will be confusing to a jury. Accordingly, to the extent that Plaintiff is suing Defendants Firestone, Squires, and Nix under Title VII, Title IX, and the ADA in their official capacities, Defendant's motion to dismiss them as defendants is hereby DENIED.

III. STATE CLAIMS

Plaintiff also asserts state law claims against Defendant Nix for intentional infliction of emotional distress and interference with Plaintiffs right to contract. Defendant Nix argues that he is immune from liability under the Georgia Tort Claims Act, which expressly prohibits suits against individual state employees acting within the scope of their employment. O.C.G.A. § 50-21-25(b). Plaintiff argues that she is suing Nix individually, not as a state employee, and that Nix was not acting within the scope of his employment when he engaged in the challenged conduct. However, the Georgia Court of Appeals recently rejected this very argument in *Howard v. Miller*, 222 Ga. App. 868, 870, 476 S.E.2d 636, 638 (1996) (rejecting Plaintiff's argument that he sued the defendants as individuals and that therefore the state tort claims act giving immunity to state employees did not

apply to his suit). *See also* O.C.G.A. § 50-21-25(a) ("[the Georgia Tort Claims Act] constitutes the exclusive remedy for any tort committed by a state officer or employee.").

Under the Georgia Tort Claims Act, not only is Nix immune from liability from the acts about which Plaintiff complains, but Plaintiff's claims must also fail because she failed to give ante litem notice. Accordingly, Defendants' motion to dismiss Plaintiff's state law claims against Nix is hereby GRANTED.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is GRANTED IN PART and DENIED IN PART.

1. Defendants' motion to dismiss Plaintiff's First Amendment retaliation claim is hereby DENIED.
2. Defendants' motion to dismiss Plaintiff's Due Process claim (based on property and liberty interests) is GRANTED. Accordingly, Plaintiffs Due Process claim is hereby DISMISSED WITHOUT PREJUDICE.
3. Defendants' motion to dismiss Plaintiff's Equal Protection claim is GRANTED. Accordingly, Plaintiff's Equal Protection claim is hereby DISMISSED WITHOUT PREJUDICE.
4. Defendants' motion to dismiss Plaintiffs Title VII, Title IX, and ADA claims against Defendants in their individual capacities is hereby GRANTED. but with respect to such claims against Defendants in their official capacities. Defendants' motion is DENIED.
5. Defendants' motion to dismiss Plaintiff's state law claims against Defendant Nix is hereby GRANTED.

SO ORDERED, this 12 day of May, 1998.

DUROSS FITZPATRICK, JUDGE
UNITED STATES DISTRICT COURT

RELEVANT STATUTORY PROVISIONS

42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. 2000e-3(a) provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an

unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.